AMERICAN GOVERNMENT

BY

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To the memory of CHARLES EDWARD HILL



Preface

This book has been organized with the objective of retaining the advantages of a separate discussion of the federal and state governments where such treatment seems to fit the realities of the actual situation, and to follow a unified treatment upon those matters wherein federal and state activities are in fact merged.

To this end, the description of the structure or machinery of the federal and state governments precedes the discussion of the forces, such as parties and public opinion, that put this machinery into motion. The discussion of these forces, in turn, precedes the outline of the activities of the federal and state governments in relation to the great problems of the age.

More specifically, the book is divided into six parts dealing with:
(1) political theory; (2) the federal government; (3) the state and local governments; (4) the forces, such as parties, that formulate policies and furnish the motive force for these governments; (5) limitations upon the exercise of governmental power in relation to the individual; and (6) the activities of government. A separate treatment of the federal and state governments appears only in Parts I and II, dealing with structure. This plan eliminates a considerable amount of duplication and, it is hoped, presents a clear picture.

A greater emphasis has been placed upon constitutional problems than is customary, even at the expense of some descriptive detail. This has not been due to a desire merely to meet the current interest in such problems, but has resulted from the conviction that there can be no real comprehension of our governmental organization or political problems without a foundation in constitutional theory.

The book was begun jointly with my friend and colleague, Professor Charles E. Hill. At the time of his death, Professor Hill had completed several chapters and these, revised and brought down to date, appear as Chapter II, The Declaration of Independence and the First Two Governments of the United States; Chapter III, The Constitutional Convention; Chapter IV, Changing the Constitution; Chapter VIII, The President; Chapter IX, The Cabinet and the Departments; and Chapter XI, Citizenship and Immigration. I wrote all the other chapters.

Since footnotes, except for cross references, have been eliminated, acknowledgments to other writers whose works have been used are carried in the references at the end of each chapter. Citations to court decisions are carried in the references.

I desire to express my appreciation for aid in reading certain of the chapters, dealing with matters within the field of their special interests, to my colleagues, Professors Richard N. Owens, John A. Tillema, Ralph D. Kennedy, Harold G. Sutton, and Steuart H. Britt, and to Mr. Harryman Dorsey of the District of Columbia Bar, and Miss Ada Lillian Bush of the Department of Commerce. For criticism upon the entire manuscript I am deeply appreciative of the assistance of Professor Schuyler C. Wallace, of Columbia University. To the officers and employees of federal bureaus and to party officials in the Capitol building I wish to express my appreciation for information that could not have been obtained without their aid.

W.R.W.

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PART I POLITICAL PHILOSOPHY

CHAPTER I

The Theory of the State

The term "political science" is commonly used to denominate that branch of learning which treats of the facts and problems of government. It is concerned with the description of the governmental framework of the various countries of the world, with the way in which these governments function, and with the forces that actuate them. In addition, it includes the study of problems relating to the nature and origin of the state as an institution and the justification for its existence.

"Political theory" or "political philosophy" is a branch of political science in this broad sense, and is concerned with problems that are common to all states and their governments. Political theory, therefore, includes not only abstract problems concerning the state but also such questions as the classification of the various forms of government, the determination of the relative advantages of one kind of government over another, the definition of the essential organs of government, and the delimitation of the functions that a government properly should perform. These problems are peculiar to no single state, but are general in nature.

The State

The term "state" as used in political science is most easily understood through the analogy of a corporation. A corporation is composed of many individuals who hold shares in the enterprise. Yet, despite the fact that there are many shareholders, the corporation is assumed to be a single entity which for legal purposes is given many of the attributes of a person. It can own property, assume obligations, and sue and be sued. Judgments against it can be collected from its own assets and not from the property of the shareholders. Despite the fact that we cannot place our finger

upon any tangible thing that can be called the corporation, nevertheless we conceive of it as a single unit. Although it is merely an abstract legal entity, it is none the less a reality.

States also are abstractions. It is true that they have populations, but a state is no less or more a state when its population is smaller or larger. Just as a corporation has an existence distinct from that of its shareholders, so a state has an existence apart from its population. States also possess territory, just as corporations may own property, but they are no more or no less states whether their territory is small or large.

There has been much speculation over the question of what constitutes the minimum physical requisites of a state. For practical purposes these are population and territory. However, a corporation might exist without the ownership of property and could function in rented offices, and in the same way it is not impossible to conceive of a state without territory. There have been examples of nomadic peoples or peoples moving from one region to another, who owned no territory, unless one assumes that they claimed and owned the territory through which they were passing. Also there have been peoples who were driven temporarily from their own country so that their governments functioned in alien territory. For practical purposes, however, a state must have possession of territory in order to function. Otherwise it will disintegrate. Certainly a state must possess population, for the state is a political unit and political relationships cannot exist without people.

The state possesses one characteristic that no other entity can possess. It is the final legal authority within its own limits. No other body can claim equality with it from the point of view of authority. It can create corporations or dissolve them, can set up governments, monarchical, aristocratic or democratic, presidential or cabinet, centralized or decentralized, and can dissolve them at any time. States have provided for an established Christian church and have set up the worship of Baal, have recognized the existence of labor unions and have forbidden their existence, and in no case has the will of the state been less binding than in another. We can conceive of a state issuing laws that are wrong, but we cannot conceive of a state issuing commands that are il-

legal. Some writers have contended that there are legal restrictions on the state: that it is limited by "moral law" or by "natural law," and that it has no authority to transcend these limitations. However, it is difficult to imagine a condition in which any particular law could not be made legally binding upon a people. Suppose, to take a ridiculous example, that a state should decree that all its citizens must commit hara-kiri. Of course the law would be ignored. Yet a state may command that a man go to war and into a firing sector where he is certain to be killed, and presumably an authority that can legally require a part of the population to place themselves where they will be shot has legal power to do the same with the rest. Nor is it easy, when the state may command certain death, to conceive of a limitation upon the choice of means.

Of course, a state may issue such unjust laws as to forfeit all moral claim to obedience. There is a moral right of revolution. But revolution is illegal by its very nature.

Sovereignty

This supreme legal authority in the state is known as "sover-eignty." It has been defined as the supreme will in the state. It is that quality that we attribute to the state which gives to its commands a legal superiority over the commands of any other body. Formerly it was thought that sovereignty was divisible, that in a federal state such as the United States, both the United States and the individual states could be sovereign, each within its own sphere. It was John C. Calhoun who made it clear that sovereignty could not be divided, that either the United States or the states must be sovereign. It is now accepted that sovereignty must be a unity, that a supreme will cannot be divided.

Government

In addition to the concept of the state with its distinguishing attribute of sovereignty, there is the tangible element of its government. It is through government that the will of the state is formulated as commands or laws. Where there is a king whose

decrees are legally binding, sovereignty rests in him. Where, as in Great Britain, "the King in Parliament" is supreme, sovereignty must rest there. In the United States there is a written constitution which places limits upon the authority of all bodies and officers, and one can hardly say that sovereignty rests in any definite body. This, however, is of no importance. Wherever a governmental organ exists in the United States, it expresses the sovereign will so long as it acts within its own jurisdiction.

The Positivists

The ideas concerning the state and sovereignty as outlined above may be called the "orthodox" theory of the state. The doctrine of sovereignty was set forth in classic form by Jean Bodin (1530-1596), who was enunciating a legal theory suited to the developing French monarchy of his time. His king was "sovereign." The theory was further developed by John Austin, an Englishman (1790-1859), and has since been refined by other writers. Thinkers of this school are usually referred to as the "analytical jurists." They study the state from a legal or juristic angle and regard it as the source of law. Sometimes they are called "positivists," since they conceive of law as existing by positive command of the sovereign, and not as a historical growth or as existent without an affirmative order.

It is not to be assumed, however, that these ideas have gone undisputed. They have been questioned from many points of view. The idea that law can come into being only by command of the sovereign has been questioned as not describing the true condition of affairs. The common law, for instance, has not been enacted by a legislature, but has been developed as custom and applied by the courts. This problem of customary law was dealt with by Bodin himself, who pointed out that custom existed as law only with the sanction of the sovereign. Thus, when the courts apply the principles of the common law, the sovereign is in effect commanding them. It is not necessary that a law be formulated by the legislature. Law may be, and is, made by other organs of government, of which the courts are one. When the courts apply the common law, the sovereign speaks.

Some of the most strenuous objections to this theory of the origin of law are made by the international lawyers. Obviously, if law can be made only by command from a sovereign, the phrase "international law" is a contradiction of terms, for if it is international, it is not law, and if it is law, it is not international. It is pointed out that international law does in fact have binding force, that it is recognized and applied by modern nations, and that it has all the characteristics of law.

The reply of the adherents of the doctrine of sovereignty 1s that the mere fact that international law is not truly a world law, enacted by a world sovereign, does not lower its dignity as possessing a moral binding force. Moreover, they recognize international law as true law when applied by the courts of any one country, for it then becomes the municipal or national law of that country. It is as much the law of that country as is the common law. Thus, international law takes its place beside the common law as customs or agreements enforced by the courts. In this sense it is, however, municipal rather than international law. It is international law in the sense that its subject matter is international, but its force is derived from the fact that it is adopted as the municipal law of a particular country and not from any other source. A true world law upon international matters could not exist, under this "orthodox" theory, unless there were a world sovereign, in which case all existing sovereignties would disappear.

One objection to the theory of sovereignty has been that it magnifies the state into an all-powerful body, giving it dictatorial powers and subjecting subordinate bodies and individuals to its supreme will. As such, it is said to be dangerous to liberty. It is true that the sovereign of the early writers was a personal sovereign, and that the doctrine set forth by its earlier exponents did envisage an all-powerful ruler. When, however, the doctrine is developed as outlined above, reducing sovereignty merely to the distinguishing attribute of a state that must be assumed to be supreme, it can hardly be said to have an ominous aspect. In fact, this view of the state meets with the contrary objection that it is so innocuous as to be meaningless. However, it does seem to furnish a logical explanation of the phenomena of the

state, and no substitute has yet been offered that has met with general acceptance.

The Pluralists

One school of thought that has found fault with the doctrine of sovereignty is known as pluralism. One of the outstanding pluralistic writers is Harold J. Laski. The pluralists deny that any single entity is in actual life supreme. They point out that the individual owes loyalty to many different authorities each in its own sphere, that he has not only a loyalty to the state in political matters but a loyalty to his church in religious matters, a loyalty to his family in matters pertaining to it, a loyalty to his labor union in certain economic relationships, a loyalty to the neighbors in his block perhaps in other respects. The pluralists believe that the concept of a single sovereignty supreme in all aspects of life does not describe the actual facts of our modern complex society. They are also suspicious of the purposes that may lie behind the concept of sovereignty, since it implies a supreme authority that may trample out all subordinate organizations and individuals. They appear also to question the supremacy of the political state, when economic and social organizations may be equally important.

The pluralists have emphasized the conflicts in our obligations to various associations. However, in determining the jurisdictions of these associations and in settling conflicts between them, it seems that there must be some authority above them. In fact, the pluralists themselves have found it necessary, when they formulated a constructive theory, to retain the state as an ultimate authority. When they do this, the system seems to offer no essential difference from that of the analytical jurists, for the latter do not claim for the state anything more than ultimate authority. So far as the pluralists have made an actual contribution to political thought, it appears to be rather in their emphasis upon the many-sidedness of modern life. They object to the concept of sovereignty because they believe that it serves no useful purpose in a complex society. However, their doctrines appear to bear more upon the organization of government than upon the theory of the state, and lead to the conclusion that our governmental

system should recognize a large degree of independence upon the part of subordinate economic and social groups. They seem to be closely related to the theories of such schools of thought as guild socialism, which would organize the governmental system upon functional lines. These schools of thought will be discussed later.

The Idealists

At the other extreme from pluralism is the idealistic theory, developed particularly in Germany. The philosopher Hegel (1770-1831) enunciated an idealistic theory in which the state was exalted as the embodiment of freedom, in which alone the individual attained his complete development. The state was "the march of God in the world." This mystical theory is by no means easy to understand, but certainly it elevates the state to a position of transcendent importance, identifying the individual with its ends.

The Right of the State to Exist

Not only are there conflicting ideas upon the nature of the state but also there have been many theories concerning the right of the state to exist. One of the oldest doctrines is that of divine origin, holding that the state is an institution created by God. Sometimes it has been argued that a particular government or dynasty was set up by divinity. Under such claims, rulers may call for obedience on the ground that their rule possesses, directly or indirectly, the sanction of the Deity.

The Contract Theory

Another theory bases the state or its government upon contract. This justification for the existence of the state was prevalent at the time of the American Revolution, and our Declaration of Independence was one of its products.

Most of the philosophers of the contract theory begin with a state of nature in which man either actually at one time existed or in which we must assume he existed. He then left the state of nature through a contract, usually spoken of as the social con-

tract, by which a governing authority was set up. The state, therefore, owes its existence to the agreement of those who are subject to it. The justification for rulership is the consent of the governed. The various exponents of the contract theory were by no means united upon details, however. The differences appear mainly in the assumptions they made concerning conditions in the state of nature, in the terms of the contract which set up the state, and in the conclusions which they drew from these premises.

Thomas Hobbes (1588-1679) assumed that man in a state of nature was selfish, aggressive, and brutal. Since all men were striving for power over others, and since all men are substantially equal, there was constant warfare. Coming finally to realize the uselessness of this conflict, they entered into a contract in which they surrendered all their rights to one man, the sovereign. Therefore, the people were absolutely subject to the sovereign. He could do them no legal wrong, for all their rights were vested in him. Hobbes' doctrine, despite his assumption of the equality of men, led to absolutism in government.

However, in most instances the social contract theory was used in support of freedom as opposed to absolutism. A philosopher whose doctrines were influential upon the men of our own Revolution was John Locke (1632-1704). Man in Locke's state of nature was not the aggressive brute pictured by Hobbes. On the contrary, life in the state of nature was primarily one of peace, freedom, and good will, although eventually, to prevent violations of that peace and order, men did voluntarily leave it for a life in political society. Locke also differed from Hobbes in holding that in the state of nature there was a law of nature which was binding upon men. This law forbade any person to take another's life, liberty, or property arbitrarily. Everyone in the state of nature could enforce the provisions of natural law, preventing violations of that law and punishing transgressions. From these differences between Locke and Hobbes there proceeded differences in the terms of the social contract by which men left the state of nature for that of political society. In it, according to Locke, each man merely surrendered to the commonwealth the rights that he had possessed of enforcing the laws

of nature. Since no man had ever possessed the right arbitrarily to take another's life, liberty, or property, the king or legislature had no such right. No man could contract away a power he himself did not possess, and the commonwealth had no powers other than those granted in the contract. From this doctrine proceeded Locke's theory of revolution.

If the governing authority departs from the terms of the contract and takes the life, liberty, or property of citizens arbitrarily, then the governing authority itself has broken the contract, releasing the people from the obligation of obedience, and they may overthrow the existing governors. Locke did not hold revolution to be justified by a single isolated instance of violation, but "if a long train of abuses, prevarications and artifices" showed a continuing purpose to encroach upon the rights of subjects, revolution was held to be both legal and proper. Locke was the philosopher of revolution. His influence is shown in our own Declaration of Independence, which restated the doctrine that government should be based upon the consent of the governed and listed "a long train of abuses and usurpations," which were offered in justification for revolt.

Other adherents of the social contract theory assumed still other characteristics for men in the state of nature, different terms in the contract, and different theories concerning the powers of governing authorities. Montesquieu (1689-1755) held that man in the state of nature was timid, apprehensive, conscious of his own weakness. But two men retreating in fear from one another would each note that the other was frightened. This would give courage to each and they would return and enter into association.

Jean Jacques Rousseau (1712-1778), most famous of all the philosophers of the contract doctrine, is supposed to have been influential in preparing the minds of Frenchmen for their great revolution. Rousseau's natural man was happy. The social contract was entered into in order to secure the benefit of collective action in combating obstacles to the continuance of that happy state. The contract set up an all-powerful sovereignty to which all individual rights were surrendered. However, Rousseau preserved the liberties of the people through his concept of

the "general will." Sovereignty could express itself only through this "general will," which was not the will of each individual according to his own interests but his will as a citizen. It was not a majority or even a unanimity of individual wills, but was the will of the state as a unit. The recalcitrant person who was compelled to follow the general will against his own individual will was merely being compelled to follow his will as a citizen. Through this concept Rousseau was enabled to erect an omnipotent sovereign without actual loss of individual rights. We are "forced to be free." His concept may not be convincing or even entirely comprehensible, but it served its purpose.

The validity of the social contract theory is not now accepted. No one believes in the state of nature either as a historical fact or as a condition that need be assumed in order to construct a valid philosophy. Little is said now of the "natural rights" of man. However, the social contract theory lent its support to the democratic idea that government should be based upon the consent of the governed, and in some of its forms became a powerful weapon in the hands of the opponents of absolutism. It played a prominent part in eighteenth-century revolutionary movements.

Utılıtarıanism

One of the chief critics of the contract theory was Jeremy Bentham (1748-1832). Bentham held that the social contract was a fiction, perhaps once serving a useful purpose, but not needed at the present time. He saw no necessity for assuming the existence of a broken contract in order to justify resistance to arbitrary rule. If the existing governmental authority was acting in such a way as to lead to harmful results, there was a right of revolution that needed for its justification no legalistic theory of a broken contract. Revolt against the existing government was justifiable if "the probable mischief of resisting it would be less than the probable mischief of submitting to it." This is an application of the principle of "utilitarianism" or of the greatest good for the greatest number, a principle which Bentham developed so thoroughly that it is usually associated with his name, although he was not its originator. It offers a

justification for good government without the interposition either of a contract or of a command from Deity. Bentham's idea of the origin of the state was similarly direct. He said that a political society came into being when a people got into the habit of obedience to a particular governmental system. He did not attempt to specify the particular moment when the state began to exist but suggested for this the time when the names of offices came into existence.

Anarchism

One school of philosophers questions entirely the right of the state to exist, or more strictly, it questions the validity of all forms of coercion. William Godwin (1756-1836) is sometimes called the first modern anarchist. Other prominent anarchists have been Michael Bakunin (1814-1876), Prince Peter Kropotkin (1842-1921), and perhaps best known of all, Count Leo Tolsto1 (1828-1910), whose philosophy is sometimes characterized as "Christian anarchism." The anarchist revolts at our present organization of society, which he feels is based upon the lowest human instincts. We work because otherwise we would starve. We obey the law because violations would be punished. We are subjected to the control of the state without reference to our own desires. Existing society is based upon compulsion and fear, and it does not appeal to our highest instincts. The anarchist proposes to rely upon man's sense of right and love of his fellow man.

Some anarchists have tried to picture a scheme of things in which no one is compelled to be a member of a state. The old large-scale states, they believe, would disappear automatically and in their place there would be numerous societies, each occupying a small area. No one would be compelled to become a member of such a society but, as a matter of fact, everyone would desire to join with others in associations for mutual helpfulness. Even within societies there would be no compulsion, but each individual would seek that place in which he could do the most good.

Most anarchists would abolish private property. With no compulsion to work everyone would nevertheless desire to per-

form his share in the common economic life. With no laws to obey everyone would nevertheless fit himself into the plan of society without complaint. The anarchist would substitute the desire to serve for the base instinct of fear, and brotherly love or intelligent self-interest for force and coercion. He believes that much of what we call crime is a revolt against an unjust economic and social system, and that most of our misery is of our own creation, brought about through a society that is based upon fear. Some anarchists have held that men are inherently good, that we have evidence that individuals do make sacrifices for humanity, and that a society can be formed upon the principles of brotherly love. Others have pointed out that intelligent selfinterest would be sufficient to render a man a useful member of a noncoercive society. Some anarchists have proposed violence as a necessary step in the overthrow of the present order. On the other hand, Tolstoi opposed all violence, although he did advocate a passive resistance, such as the nonpayment of taxes. Violence is by no means a necessary tenet of philosophical anarchism, and in any case it is advocated only in the intermediate and purely temporary stage in which existing society is being overthrown. In its basic principles anarchism is the mildest and most pacific of all political philosophies, for it places supreme faith in human goodness or in human intelligence, and its chief tenet is the abolition of every form of compulsion.

Idealism

Contrasting with anarchism is the idealistic theory of the state, already discussed, which not only justifies the existence of the state but exalts it as the one entity in which personality attains its fullness.

Forms of Government

The form of government to be assumed by the state has been a subject for debate as long as men have been free to reflect upon governmental problems. Aristotle discussed the relative merits of government by one, by the few, and by the many; and

¹ See p q

criticism of existing forms of government have appeared from time to time. The present age has been by no means lacking in radical attacks upon the prevailing organization. These attacks are for the most part the product of our industrial age. Some of them, such as orthodox socialism and syndicalism, involve proletarian philosophies, and would set up a rule of the proletariat or working classes. Some, such as guild socialism, are pluralistic and would permit each great industry to provide its own government, reducing the scope of the political state or entirely abolishing it. Italian fascism is in part a reaction against Russian socialism but has borrowed considerably from pluralistic philosophies.

Communism

The most influential of these radical philosophies is socialism. There had been socialists before Karl Marx began his work. The "utopian socialists," for example, had proposed the setting up of model cooperative communities in which poverty and want would not exist. It is "proletarian" socialism, however, that led the way in the great modern socialist movement. Karl Marx (1818-1883) is regarded as the founder of this "proletarian" or "scientific" socialism, although some of the credit should go to his colleague Friedrich Engels (1820-1895) and to Ferdinand Lassalle (1815-1864). All three were Germans, Marx and Lassalle being of Jewish descent.

The two best-known writings of Marx are the Manifest der Kommunisten or the Communist Manifesto, drawn up with the assistance of Engels, and Das Kapital: Kritik der politischen Oekonomie or Capital: A Critique of Political Economy. The latter, Das Kapital, has been called the "Bible" of socialism.

The whole Marxian philosophy leads to the conclusion that the modern capitalistic system is destined to fall and be succeeded by the rulership of the proletariat, and that the workers are justified in striving toward that end.

His doctrine centered around a theory of value, a theory of wages, and a philosophy of history. His theory of value was that the market value of any article lay in the labor that had been put into it, the total labor that had been necessary in its

production from the extraction of raw materials from the earth to its final emergence as a finished product. His theory in this respect was not very different from that of many early economists. His theory of wages was that the wages of workmen will necessarily remain at a bare subsistence level. This theory also did not differ from that of some early orthodox economists. From the two, Marx developed in detail the theory of surplus value, which is the difference between the wages paid and the sale value of an article. This surplus is absorbed by the capitalist although he has contributed no labor to the production of the article. Marx's philosophy of history lay in the theory of economic determinism, that is, that it is the play of economic forces that gives to each age its distinct characteristics. Each age has economic classes with conflicting interests, and the nature of the classes and the form taken by the conflict give to that age its characteristics. The opposing classes are in constant process of change.

In the present age, Marx found two classes, the capitalists and the workers, between whom there must be conflict. In this conflict capital is destined to be defeated. He believed that there is a tendency in capital toward greater and greater concentration. This necessarily leads to the concentration of laborers, who will develop a class consciousness, and in the end they will replace the capitalists in power. Thus, the fall of the capitalistic class is inevitable. At the same time Marx advocated revolutionary tactics on the part of labor to bring about that desirable end. After the workers had established themselves in power, they would begin the process of transferring capital from private to public ownership. This process would be continued gradually until all capital had been socialized. It will be noted that this doctrine of Marx contemplated the revolution as the first step, establishing the supremacy of the proletariat, and after this, socialization of capital. However, Marx appears not to have been opposed to measures that would alleviate the condition of workers or otherwise encroach upon the position of capital even before the revolution had occurred.

Marx contemplated not only a socialization of production but also a socialization of consumption, a state in which workers would be rewarded according to their abilities and needs and not merely according to the existing conception of wages as fixed by the play of supply and demand. This ideal state, however, was reserved for the time when men were fully imbued with the idealism of communistic philosophy.

The followers of Marx have not been entirely united upon policies. Marx's ideas have had a tremendous influence upon the progress of events since his time. It was only natural, however, that divisions should develop in the growing socialist ranks. The question of "state socialism" was the cause of one such division. The strict adherents of Marx held that the revolution should come first and the socialization of capital later. Others were willing to cooperate in the extension by the existing states of governmental ownership of various industries such as railroads and telegraph systems and in measures for the benefit of the workingman. To orthodox Marxians this "state socialism" does not necessarily lead to true socialism, for the existing states are not controlled by the proletariat. Only when the workers are in power can the socialization of capital lead to a truly socialistic state.

An excellent sample of the more moderate type of socialism appeared in England in the Fabian Society, which was organized in 1884. It has included in its membership such intellectuals as George Bernard Shaw, H. G. Wells, Sidney Webb, Graham Wallas, Harold J. Laski, and J. Ramsay MacDonald. Abandoning the Marxian theory of value, the Fabians hold value to be the product of society and therefore propose to return to society that which it has created. They would transfer all means of production to the state. They do not, as does Marx, advocate the supremacy of a single class, the workers. Instead, they propose to retain the present state with a justly representative system of government. They do not advocate revolutionary methods. The Fabians propose to follow the slow, patient method of gradual socialization rather than rush into revolution. They have been very successful in using their influence in aid of the government ownership of public utilities, heavy taxes on inherited and "unearned" wealth, and measures to alleviate the condition of the workingman.

Other socialistic groups have rejected some of the doctrines of Marx, such as his theory of value, while still adhering to his basic conclusions. The general tendency of these groups is toward greater moderation. They show a willingness to be satisfied for the present with the gradual absorption by the state of public utilities, taking them over company by company as the occasion arises, and in lieu of this may even lend support to governmental regulation of privately owned and operated businesses, and to laws designed to ameliorate the condition of workers. In fact, the immediate aims of some groups of socialists are little different from those of "liberals" in politics, although their ultimate objectives are different, for the socialist is looking toward the final socialization of all capital even though the steps to that end are taken slowly.

In Soviet Russia a practical experiment in socialism along Marxian lines is being tried out. It followed closely the Marxian sequence, for revolution came first, then the supremacy of the proletariat was attained, and the process of socialization followed. However, it is interesting to note that Russia was not such a highly industrialized country as to be ripe for revolution according to the Marxian theory. The Russian communists are followers of the orthodox Marxian ideal. It is true that they have found it expedient to make some concessions to private ownership, but their devotion to the socialist ideal is retained throughout all changes. Organized propaganda managed by skillful publicists has been directed at every element in the population. Earnest efforts to improve the economic condition of the country are being made, and projects designed to improve the material well-being of the people have been instiated. On the other hand, opposition is cruelly extinguished and individual thinking except along communist lines is crushed. Religion is discouraged, and liberty of thought and of action, except within the limits of Marxian ideals, does not exist. Regarding the Russian revolution as merely the prelude to a world revolution and the overthrow of the capitalistic system, the communists have carried their propaganda into other countries. In some instances this has produced violent reactions. Italian and German

fascism are in part countermovements against the spread of com-

Syndicalism

Bearing some resemblance to socialism is syndicalism. The term "syndicalism" comes from the French syndicat, or labor union. Syndicalism, a French movement, is more a philosophy of action than a closely reasoned system. Syndicalism, under the leadership of men like Georges Sorel (1847-1922), who is best known for his Reflections on Violence, placed the emphasis on the revolutionary phase in which the proletariat would destroy existing capitalistic society, and had less to say of the organization that was to follow. It advocated "sabotage," a word that had reference to the workman's wooden shoe, possibly with the idea that the wooden shoe could be thrown into machinery and destroy the latter's usefulness. The general strike of all workmen was proposed as a means of destroying existing society. As to what should be done after the capitalistic system had been destroyed, the syndicalist theory was somewhat vague. Apparently, however, the state was to disappear and in its place would be the organizations of workmen. These bodies would control the new society. Courts, as we know them, and prisons would disappear, for it was assumed that in the new order they would not be needed. However, later syndicalist theories are less revolutionary and describe a society in which industry is controlled jointly by owners and workers, or by the public (the owners), the workers, and the consumers, in publicly owned enterprises. The state is retained in attenuated form.

Guild Socialism

The guild socialist movement was an English product of the first quarter of the present century. It was based upon the idea that property had a social rather than a private function to perform, and upon objections to the minute division of labor and the machine system, which convert the workman into a mere puncher of holes or a tightener of bolts rather than a skilled

craftsman. The guild socialist looked back for guidance to the medieval guild system, which produced master craftsmen who could take pride in their products, and which gave to the various crafts the control of matters relating to production and distribution. On the political side they believed that democracy in the modern state was not truly representative, since a member of a legislative body might be chosen for his opinions upon some one problem, such as foreign affairs, and yet cast his vote upon a variety of other matters upon which he had no actual mandate from the people.

The guild socialists proposed the organization of society according to economic and social functions. All persons who were of the same occupation—manual, professional, or otherwise—or who were members of any group supplying a social need, were to constitute a unit or guild, with powers of self-government in the performance of the functions upon which the unit was based. Even consumers were to be organized into consumer units. There would be local units controlling local matters for a particular industry, and these would be combined into a national unit which would have power to decide upon matters of general interest, including perhaps those of fixing prices and of determining the size of the annual output for the industry. Each association would have the power to levy enforced contributions or taxes upon its membership. While guild socialism did not necessarily propose to abolish private ownership, it did involve an encroachment by the workers upon the control of industry. Guild socialism would not abolish the state. The state would be retained to perform functions of general concern and to settle questions of jurisdiction between guilds. At times, guild socialists regarded the state as a kind of consumers' guild, representing the public as consumers.

While guild socialism as a separate movement appears to have subsided, certain features of its philosophy have appeared recently. The so-called "corporative state" of Italian fascism bears some resemblance to guild socialism, as it does also to the later forms of syndicalism. Under the "New Deal" in the United States, members of a single economic group have been given certain powers in relation to their own problems. Under

the codes of the National Recovery Act, each industry, under governmental supervision, could lay down regulations for itself, and code authorities were set up in which representatives of an industry had much to say upon the activities of its members.² Under the Agricultural Adjustment Act, groups of farmers were given an opportunity to vote upon crop limitation programs.³

Fascism

Italian fascism, viewed superficially at least, shows the influence of syndicalist and guild socialist ideas. The "corporative state" of the fascists refers to the organization of the country into functional groups. Thus the Italian state is composed rather of groups than of individuals. These groups are primarily economic in nature. Each has certain powers in relation to its own members and the right to cooperate with other groups. For instance, in certain industries the workers and employers each constitute a group or "syndicate," and between themselves may enter into agreements concerning wages. Disagreements are settled by a government labor court. While workers' and employers' syndicates are organized separately, there are also a number of joint corporations which include representatives of both employers and workers, and which attempt to settle problems arising between employers and workers in any industry. Over all is the National Council of Corporations, containing representatives of employers, workers, and the public. It is presided over by the Minister of Corporations. All decrees affecting the economic life of Italy must be approved by the National Council of Corporations. As a matter of fact, however, the Fascist party names the officers and representatives of the various syndicates and controls the National Council of Corporations. The Fascist Grand Council is the actual ruling body of Italy.

Accompanying the corporative principle is that of the "totalitarian state." This has reference to the superiority of the ends of the nation to the private desires of any individual or group within it. Nothing may take precedence over the state. It is entitled to every devotion, and no sacrifice is too great to be

² See p 623

⁸ See p 725

made for it. Every action and thought of the individual should be oriented to the greatness and glory of the nation. This constitutes the totalitarian state.

Fascism does not abolish private property. However, owner-ship may not be exercised to the detriment of the nation. It is subject to regulation for the good of the whole.

The fascist state borrows somewhat from syndicalism and guild socialism in its corporative principle. Its use of violence to attain its ends has something of the flavor of syndicalism and of Marxism. Its totalitarian principle seems to be related to the mystical Hegelian view, which elevates the state into something superior to the individuals of which it is composed. Practically, it constitutes a unifying influence in a country in which the national principle has not been long established. In it, however, the individual is submerged, and liberty, as it is known in democratic countries, does not exist. The press is muzzled and free speech is not permitted. As in Russia, much reliance is placed upon propaganda. While fascism presumes to be a bulwark against communism, an outsider sees much in common between the two philosophies as actually practiced by their devotees.

The Changing Order

It is evident from this survey that there is a tendency to question the capacity of the large-scale state to order effectively the many and complicated relationships of modern society. Just as, in the past, geographical subdivisions were given jurisdiction over matters of local interest, there have been some tentative steps taken in a few countries toward giving to functional subdivisions a measure of control over matters pertaining to themselves. The outstanding example of a practical experiment in this direction is the corporative phase of Italian fascism. The pluralists have given aid to these experiments through their attack on the doctrine of sovereignty.

Along with the growth of this functional idea there has been a decline in the powers of geographical subdivisions. There has been a tendency toward concentration of power in the hands of central governments and the elevation of duty to the state as a

whole into something of almost fanatic devotion. Together with this, there has been a tendency to concentrate the powers of the central government into one, or very few, hands. Communist Russia, fascist Italy, and National Socialist Germany, while proclaiming divergent doctrines, show a striking similarity in their dictatorships and in the methods by which the dictators maintain themselves in power.

A further tendency in political and economic philosophy is the growth of proletarian ideas. Particularly in Marxian socialism and in syndicalism, the capitalistic system has been attacked, and the supremacy of the proletariat proclaimed in its stead.

Incidental to these new theories, the representative system has suffered. Even where the forms of representative government are retained in the new dictatorships, the parliaments have been constituted on an altered basis. Organized in Russia upon a series of workers' councils, and in Italy upon the functional corporative organization, new ideas of representation have been evolved.

A moderate expression of altered ideas concerning representation is found even in those countries that have not changed their fundamental structure. Proportional representation, while not necessitating a functional setup, nevertheless does permit an arrangement of parties upon a functional basis and encourages the formation of groups with similar interests. Thus, proportional representation permits, although it does not require, a functional grouping in the electorate.

Individualism

Even the most cursory survey of recent history shows a tendency for government to assume a larger and larger sphere. Eighteenth-century liberals believed in limiting government to as few functions as possible. There were several reasons for this. In the first place, the governments were undemocratic. They were controlled by a very small part of the population. Additions to the activities of government were, therefore, additions to the influence of a small number of powerful men. It is true

^{*} See p 327.

also that when the governments of that period went beyond the mere police functions, they were likely to indulge in pernicious regulations. In the economic field, such regulations took the form of the mercantile system, which was based upon the assumption that the well-being of a country was dependent upon the retention of its supply of gold. Governments, therefore, exerted their efforts toward increasing exports and keeping imports down to needed raw materials, thus hoping to increase their gold supplies through the receipts arising from the excess of exports over imports. It was in 1776 that Adam Smith (1723-1790) published his Inquiry into the Nature and Causes of the Wealth of Nations, which did so much to disclose the weaknesses of the mercantilist theories. Other activities of government, objectionable to liberals, took the form of regulatory taxes and restrictions upon freedom of speech and religion.

The revolt against economic restrictions was developed into the doctrine of laissez faire, that is, a policy of letting things alone. It was believed that if trade were left free from political restrictions, the economic laws of supply and demand would bring about a proper balance between production and consump-According to this theory, the price of any kind of goods is determined by the relation between the supply of those goods and the demand for them. When the supply is small and the demand large, the price will be high, for there will be proportionately more bidders and competition among bidders will run up the price. When the supply is large and demand small, the price will decline. At the same time, if profits become low, production will be reduced. The persons to withdraw from production will be those whose facilities are the least favorable, for they will be making the lowest profit. On the other hand, when prices are high, other producers will enter the field in order to share in the high profits, but since they will add to the supply, a decline in price will set in. As a result of these forces, there is a tendency for prices to come to an equilibrium. The policy of laissez faire would leave the economic world free from governmental restrictions, thus allowing the unhampered play of "natural" forces. To a very considerable extent it represented a reaction from the unsound regulations of the mercantilist period.

The closing half of the eighteenth century witnessed the beginning of the great Industrial Revolution, which put the policy of laissez faire to a severe test. The spinning jenny was developed in the 1760's and was quickly followed by other mechanical inventions, including a steam engine capable of practical application in industry. The old system of hand labor carried on by small numbers of craftsmen in small establishments, perhaps a single master with a few journeymen and apprentices working together in a close personal and family-like relationship, disappeared. In its place there arose the "factory system," under which workers were brought together in large establishments. These workers were not the craftsmen who had produced the manufactured articles before the age of machinery. Instead, they were comparatively unskilled laborers who learned with only a brief training to perform the simple operations required in machine manufacture. Women and children were satisfactory for the purpose. Easily trained, they were easily replaced. Wages fell to a bare subsistence level, long hours were the rule, and factory conditions were insanitary and unsafe.

Sympathetic and socially minded men proposed legislation to place some limits upon these conditions. More reasonable hours and more satisfactory physical surroundings appeared to be called for by the common rules of humanity, and since no amelioration of conditions could be expected from the factory owners, the remedy was legislation. This was a departure from laissez faire, and met with the opposition of the adherents of that doctrine. However, factory legislation was enacted and as the century advanced was made more severe and more inclusive. Each step was fought by the factory owners. The political theory which developed in opposition to the increasing activity of government limited the proper sphere of the state severely to police functions. Even the biological doctrines were called upon in defense of the old order. It was admitted that there was distress among workers, but it was pointed out that there is suffering everywhere in nature. This suffering is a part of the development of living organisms, for while many are destroyed, the fittest individuals survive. Thus, the race is improved. Suffering among workers is regrettable, but it is part of the development of the race. To impede this "natural" process is to oppose the dictates of nature itself. Thus, human distress became one of the natural "laws." The essential elements of this theory were developed by Herbert Spencer in his *Social Statics*, which was published in 1850, nearly a decade before Darwin's *Origin of Species*.

It is a curious fact that the doctrine of laissez faire, originally a weapon of liberalism, became the instrument of reactionary factory owners. Freedom from legislation is now a doctrine of conservatism. It is the liberal today who invokes the aid of government in the control of industry, and it is the conservative who believes in freedom from regulation.

Government in the Modern State

At the present time there are no true adherents of the doctrine of laissez faire. Even the most conservative accept the government ownership and operation of the postal system, support laws designed to render conditions in factories less dangerous, and believe in the governmental regulation of public utilities. There are, however, differences concerning the extent to which regulation should go. Those who stress the weaknesses of industry and have great faith in the capacity of government to control the economic processes intelligently and fairly, would greatly extend the activities of government, while others who doubt the efficacy of the political process and who have greater faith in the ability of industry and commerce to correct deficiencies without the aid of laws, prefer to go slowly with the extension of governmental control.

The schools of thought extend all the way from anarchism, which would abolish government or, at least, compulsion, to communism, which would carry government into the most detailed regulation of every phase of production and consumption, and therefore into a close regulation of private life. It should be noted, however, that the difference between anarchism and communism is not so great as appears on the surface. For while anarchism denies the authority of the state, it does assume a society which is bound together just as surely by the ties of broth-

erly love as any disciple of Marx would bind it by law. The anarchist does not usually picture man in a state of isolation, running loose in the woods. The society of the anarchist is little different from that of the most advanced socialists, except in the one respect that the element of compulsion is replaced by other ties. Anarchists are likely to envision a society that is entirely communistic, with the single distinguishing characteristic of the absence of compulsion.

The philosophy that reduced the state to its lowest terms was that of the eighteenth- and nineteenth-century individualists. To them, government was inherently bad. It existed merely because of the wickedness of men, and as men improved in moral caliber, government would be reduced until eventually it would not be needed. In a sense the individualists were anarchists who were not willing to rely entirely upon human goodness. The state was needed, but its functions were those of a police nature, the protection of life, liberty, and property, and the greatest of these appears to have been property.

The socialists do not look upon the state as a mere policing body. The moderate socialists would turn over to the state by a gradual process the most important industries, especially the public utilities, which are in fact natural monopolies. The extreme communists would abolish all private property and distribute the products of work according to need or the individual's contribution to society.

Most of us are not anarchists, individualists, or socialists, but our opinions come somewhere between individualism and socialism. We do not accept the abstract principle of the individualists that the state should be limited to mere police functions, nor are we appealed to by the idealistic vision of the socialists with their doctrines of the inevitable conflict between capital and labor and the necessity for the socialization of capital. Instead, each problem is considered alone without reference to abstract doctrines. On the question of the public ownership and operation of the postal system, the verdict of modern states has been in the affirmative. The importance of the postal system to the people, the fact that it operates best as a monopoly, and a belief that the mails should be carried at a low rate and without a

primary view to profits, all lead to the conclusion that it should be a state enterprise. On the other hand, the judgment of the modern world has been divided upon the question of the public ownership and operation of the railroads. In some countries railroads are state enterprises. In this country the conclusion has been in favor of private ownership under government regulation, although during the World War we had governmental operation with private ownership. In recent years the tendency has been strong in the direction of government intervention in industry and business, particularly, however, in the form of regulation.

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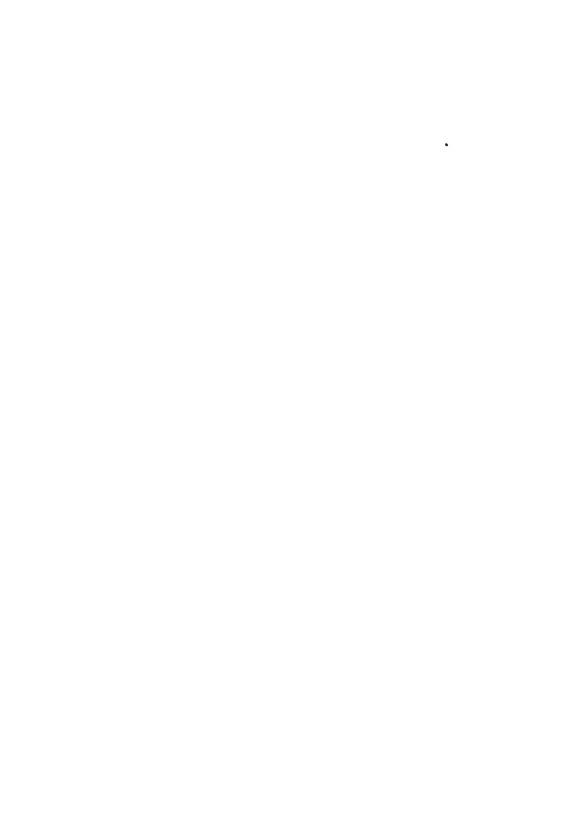
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P_{ART} II THE FEDERAL GOVERNMENT



CHAPTER II

The Declaration of Independence and the First Two Governments of the United States

The Declaration of Independence

The American Revolution opened while the contract theory was still the accepted explanation of the origin of the state, while individualism, with its theory of limitations upon governmental powers, was a part of the philosophy of liberals, and while legalized revolution as enunciated by Locke was looked upon as a necessary concomitant to liberty. It was only natural that in declaring our independence we should appeal to the world in the language of the day.

The purpose of the Declaration of Independence was to proclaim to the world the reasons and the justification for the separation from Great Britain. As pointed out by Carl Becker, its purpose was not so much to declare independence as to present the justification for a separation that already had been completed. The framers had full confidence in the rectitude of their position, but at the same time they realized that they would be stigmatized by the loyalists, by the British, and by the world generally as in revolt. They did not have in mind writing the historical causes of the Revolution. Their immediate task was to make the rebellion respectable and mentorious. To do this they desired to create a presumption against all kings, the King of Great Britain in particular.

These truths were considered self-evident: All men are created equal. They possess inalienable rights, among them, life, liberty, the pursuit of happiness. Governments exist for the purpose of securing these rights, and their power is derived from

the consent of the governed. Whenever a government becomes destructive of these ends the people have a right to alter or to abolish it and to institute a new government. The framers assumed that the opposition was negligible and that the people stood united for the Revolution.

Abuses and usurpations had been inflicted repeatedly and for so long by the King, the Declaration stated, that necessity compelled the rejection of this absolute tyianny "To prove this, let facts be submitted to a candid world." There follow a score of general charges against the King, such as the first one: "He has refused his assent to laws the most wholesome and necessary for the public good." The Declaration skillfully left the reader to fill in the facts as he saw fit. In each charge a malevolent motive on the part of the King was presumed.

The Americans had exhausted peaceful means of relief. They had petitioned for redress in the most humble terms, sent warnings to Parliament, and made appeals to the people of England for justice and magnanimity. At last they appealed to the Supreme Judge of the world for the rectitude of their intentions and declared their independence.

July 4, 1776 marks the birthday of the United States, since it was on this day that the document embodying these propositions was adopted. Richard Henry Lee's Resolution of Independence had been voted by the Second Continental Congress on July 2, and, strictly speaking, that resolution might be considered the declaration of independence. But early in June Congress had authorized a committee composed of Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston to draft "The unanimous Declaration of the thirteen united States of America," as it was designated in the parchment copy. This declaration, almost wholly the composition of Jefferson, embodied Lee's resolution in the last paragraph. On July 4, 1776, Congress adopted this measure which has since become popularly known as the Declaration of Independence. It was signed by John Hancock as President of the Congress, and on July 19 the Declaration was engrossed. Under date of August 2 the following entry appears in the Journal: "The Declaration of Independence being engrossed and compared at the table

was signed by the members." This engrossed parchment is preserved in a fitting shrine in the Library of Congress at Washington.

The United States a Member of the Society of Nations

The United States did not thereby become a member of the society of nations. In order to qualify, our country had to await recognition by one of the world powers, and Congress looked to France to perform this friendly act. Consequently, Congress accredited Silas Deane, Benjamin Franklin, and Arthur Lee as envoys to the court at Paris, but Louis XVI refused to receive them. Such a reception would have meant recognition and also immediate war between Great Britain and France, and for this France was not prepared. Our envoys began unofficially the negotiation of the treaties of 1778 and completed the negotiations for the treaty of amity and commerce and the treaty of alliance on February 6, 1778. The American negotiators were not officially received by King Louis XVI until March 20, 1778. However, France chose to extend recognition by instructing Admiral Piquet to salute the flag of Captain John Paul Jones on the "Ranger" in Quiberon Bay, February 13, 1778. This act had a retroactive effect to the date of the Declaration of Independence.

The Second Continental Congress

Since its birth the United States has lived under three governments, the Second Continental Congress to 1781, the government under the Articles of Confederation to 1789, and that under the present Constitution from 1789 to the present. The first assumed its authority and served as a benevolent tyranny. The second derived its authority from the states. According to the preamble of the Constitution, our present government rests upon the people.

The delegates to the Second Continental Congress had assembled in May, 1775, primarily for the purpose of listening to replies that might come in response to petitions sent out by the First Continental Congress. They found that George III had

refused to receive the petition sent him and in reply had dispatched an army and a squadron of the navy to suppress insurrection. The delegates realized that they had no power to govern, no money, no laws, and no means of enforcing laws. But Lexington, Concord, and Bunker Hill made action imperative.

The delegates assumed full control. Even before the Declaration of Independence they raised an army and commissioned George Washington as commander in chief. They organized a navy and authorized letters of marque and reprisal and the condemnation of prizes. They established a post office. They had difficulty in procuring hard money, but had no trouble in emitting bills of credit or paper money. They declared the independence of the United States. They accredited diplomats to foreign courts and authorized the negotiation of loans and treaties. In order to provide for a stable and responsible government, they drafted the Articles of Confederation and submitted them to the states for ratification in 1777.

The Drafting of the Articles of Confederation

John Dickinson of Pennsylvania had refrained from voting for the Declaration of Independence because he believed a stable government should be organized first. As chairman he submitted the report of the committee on the Articles. At least three points were taken up in the Congress and argued. The committee proposed the apportionment of taxes among the states in accordance with population, but Chase of Maryland, for the Southerners, protested against the inclusion of white and black, slave and free, in the enumeration. Congress decided finally, when funds were needed, to ask each state for a contribution in proportion to the value of the surveyed lands.

The committee proposed, secondly, to give each state delegation one vote in Congress. Franklin felt convinced that it would be more fair to apportion representation according to population. Middleton of South Carolina moved that contributions be taken as the measure of representation. Congress sustained the committee.

The third point concerned the settlement of disputes between

the states, especially boundary disputes. This involved the claims of several states to large stretches of Western lands, founded in most instances upon sea-to-sea grants in Colonial charters. Georgia and the Carolinas had such claims. Virginia claimed not only the land to the west of her but laid claim to what later became Ohio, Indiana, Illinois, Wisconsin, and Michigan. The Western claims of Connecticut and Massachusetts overlapped partly those of Virginia and included parts of the present states of New York and Pennsylvania. It was agreed that Congress should be a court of last resort in all disputes between two or more states. A system of procedure for handling boundary disputes was briefly sketched.

The Articles as submitted to the states on November 15, 1777 contained several provisions that were later incorporated in the Constitution. Fugitives from justice should be returned to the state in which the offense had been committed. Full faith and credit should be given in each state to the records, acts, and judicial proceedings of every other state. And the immunity of members of Congress for anything they might say in debate in the legislative sessions was stipulated.

Government Under the Articles

The frame of government was rather simple. No executive appeared The president of Congress was referred to as the titular head of the United States, although he was merely the presiding officer. The committee and its secretary that supervised foreign affairs exercised virtually the only real executive power. There was no independent judiciary worthy of the name.

Congress consisted of one house. Each state could send not less than two nor more than seven delegates to be chosen in such manner as the state legislature prescribed, usually by the legislature itself. Their term was one year and they were subject to recall at any time. This is the only instance of the recall ever provided for in our national government. The salaries were fixed and paid by the individual states and therefore lacked uniformity. Each state delegation had one vote. It required the votes of nine states to act upon important matters and the ap-

proval of the legislatures of all the thirteen states to pass an amendment.

An effort was made to give Congress the power to regulate interstate and foreign commerce, but Georgia and South Carolina refused to approve. The Southern states, with no merchant marine, feared that through such power they might be at the mercy of the Northern states. In order to provide money for the payment of interest on the public debt, leaders of Congress urged the states to allow themselves to be taxed according to population. But Rhode Island would not, and this proposed amendment failed. Another effort to amend the Articles was made providing that Congress for twenty-five years should have power to levy import duties on liquor, sugar, tea, coffee, cocoa, molasses, and pepper. Twelve states approved, but New York held out in opposition because she had built up a system of import duties of her own. The result was that the Articles of Confederation were never amended.

So fearful were the statesmen of that period of a strong central government like that of Great Britain that they went to the other extreme. The Articles declared that each state retained its sovereignty and every power and right which was not expressly delegated to Congress. At the same time, it was recognized that the free inhabitants of each state, except paupers, vagabonds, and fugitives from justice, were entitled to all the privileges and immunities of free citizens in the several states. This thought expressed an aspiration toward a common interest in the league.

Various restrictions were placed upon the states, but they heeded or ignored them as they pleased. No state could send or receive ambassadors or enter into an alliance or treaty without the consent of Congress. Neither could two or more states enter into a treaty, confederation, or alliance among themselves without the consent of Congress. Even so, Pennsylvania and New Jersey agreed upon the boundaries of Delaware. No state could levy duties that would interfere with stipulations in treaties; but the states did so repeatedly with impunity. A state could not keep vessels of war or troops in time of peace except as Congress might permit. Yet Georgia fought a war with the Creeks and made a treaty with them. Pennsylvania sent troops

to drive the settlers from Connecticut out of the Wyoming Valley. Massachusetts raised an army and put down Shay's rebellion.

Congress received apparently large powers, but the modifications were so great as to nullify them. For example, Congress could defray all governmental expenses from the common treasury, whose revenues should be supplied by the several states in proportion to the value of their surveyed lands, including improvements. Congress could ask but not compel the states to pay their quotas. Therefore, Congress had to issue large batches of paper money, then partially repudiate the issue outstanding and issue anew larger amounts. Congress could declare war but it could not raise an army. It had to ask the states to furnish troops and then ask the states to provide their equipment and pay. Fortunately, no war occurred during this critical period. Acting on the states, and not on the people directly, Congress was regarded at first with indifference and then with contempt.

Congress could make peace, enter into treaties and alliances, grant letters of marque and reprisal, and appoint courts to try piracies and felonies committed on the high seas. Congress could regulate the alloy and value of coin struck by its authority, but inasmuch as Congress had nothing with which to buy bullion, this clause carried no meaning. Congress could and did establish a post office department. During any recess of Congress a Committee of the States, composed of one delegate from each state, could be designated to manage affairs.

Six cases under the Articles of Confederation were presented to Congress for adjustment, all of them concerning land claims. However, only one case came to trial, that between Pennsylvania and Connecticut. Agents for the parties agreed upon seven members of Congress to sit as a court. The question before the court involved the conflicting claims of the parties to the Wyoming Valley in Pennsylvania near Wilkes-Barre. Pennsylvania pleaded the royal patent given by Charles II to William Penn. Connecticut pleaded a succession to the rights of the Plymouth Company, although that company had surrendered its charter in 1635. The court decided unanimously in favor of Pennsylvania.

Why It Took So Long to Ratify the Articles

Almost four years were required to obtain the ratifications of the states. By May, 1779, twelve of them had approved. Maryland held out because she had no Western lands with which to reward her soldiers, who had fought in the Revolution as valiantly as those of the states that claimed vast Western domains. Furthermore, Maryland wanted those states to cede their claims to the United States. New York yielded first in 1780. Connecticut complied also but reserved a large tract on the southern shore of Lake Erie in Ohio. Virginia surrendered her claims to land lying northwest of the Ohio River. Proud little Maryland held firm until she received assurance that Massachusetts would surrender her claims to Western lands. On March 1, 1781, Maryland approved the Articles. The next day, March 2, the new government began to function.

Leading Weaknesses of the Articles

Congress soon found that it could not regulate interstate or foreign commerce, that it could not compel the states to respect treaty provisions nor to furnish money. Congress had no taxing power. The delegates played with the idea of selling the public lands in the Northwest Territory, thus obtaining money for public needs, but this idea could not well be realized until after the passage of the Ordinance of 1787. By that year events had compelled the members of the Constitutional Convention to assemble in Philadelphia.

Whether the inability of Congress to regulate interstate and foreign commerce or the lack of power to tax constituted the greater weakness may well be debated. Historically, it was the former that caused steps to be taken to bring about corrections. Each state had its tariff and navigation laws. New York made elbow room for itself at the expense of Connecticut and New Jersey. New York provided that all foreign goods coming in from neighboring states should pay the same tax as if they had been imported directly in a foreign vessel. Vessels other than open boats going to or from ports in New Jersey or Connecticut had to pay entrance and clearance fees in New York. New Jersey

sey could find no other means of retaliation than that of levying a heavy tax on the site for a lighthouse which New York had bought at Sandy Hook.

Virginia and Maryland imposed restrictions on foreign commerce. Maryland levied both import and tonnage duties. Virginia levied import but no tonnage duties. The Lord Baltimore grant had given Maryland the southern bank of the Potomac as a boundary. Consequently, vessels bound to and from Virginia ports were subject to discrimination.

Virginia could also take advantage of geographic conditions. She had within her jurisdiction both Cape Henry and Cape Charles at the mouth of the Chesapeake Bay. She imposed light and marker fees on all vessels passing through to Maryland ports. The Pokomoke River on the Eastern Shore rises in Maryland and empties into the part of Chesapeake Bay controlled by Virginia. Virginia imposed dues on the commerce of that river and the dues fell mostly on the people of Maryland.

Alexandria Conference, 1785

From 1777 on, the two states made overtures to each other for adjustments, but with no results. Finally, a commissioner from Maryland came in contact with James Madison of the Virginia assembly, chairman of the committee on commerce. Madison saw quickly the opportunity and proposed a meeting of commissioners from both states. Commissioners were appointed and they met at Alexandria in 1785. Among the commissioners for Virginia were Madison, George Mason, and Edmund Randolph. Samuel Chase was one of the four from Maryland. The commissioners met and wrangled. Finally they determined to remove their deliberations to nearby Mount Vernon. Under the pleasant influences of General Washington's hospitality, their animosities were thawed out. Upon adjournment they suggested further conferences. Their report led to the calling of the Annapolis conference of the next year. It was felt advisable to include a larger number of states at the Annapolis meeting. The commissioners agreed to report to their legislatures in favor of annual meetings, the next meeting to take place at Annapolis.

Annapolis Convention, 1786

By January of 1786 the leaders in Virginia had invited delegates from all of the states to attend the meeting at Annapolis. Only a few states responded. The delegates were slow in assembling and because of the fewness in number they could accomplish little. They spent two days in discussing the depressed state of business and commerce and in lamenting their lack of powers. Madison wrote from Annapolis, September 11, 1786 to his friend James Monroe: "Delaware, New Jersey, and Virginia alone are on the ground; two commissioners attend from New York, and one from Pennsylvania. Unless the sudden attendance of a much more respectable number takes place it is proposed to break up the meeting, with the recommendation of another time and place, and an intimation of the expediency of extending the plan to other defects of the Confederation." Manifestly, the delegates of five states could not act for all of the thirteen. The delegates decided therefore to call a convention to meet the next year at Philadelphia.

The delegates adopted a resolution recommending to the state legislatures a meeting of commissioners from all the states at Philadelphia the second Monday in May, 1787. Alexander Hamilton is thought to have made the draft. The purpose should be "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union." A copy of this resolution was submitted to Congress and to the state legislatures.

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CHAPTER III

The Constitutional Convention

Organization

On February 21, 1787, Congress adopted a resolution which recognized the defects in the Articles of Confederation and called a convention of delegates to meet at Philadelphia on the second Monday in May, "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the Federal Constitution adequate to the exigencies of Government & the preservation of the Union."

The delegates gathered slowly in Philadelphia during May, 1787. By May 25, delegates from a majority of the states had appeared. They proceeded with the election of officers. Benjamin Franklin held the presidency of the Commonwealth of Pennsylvania and by courtesy might have expected to be elected the presiding officer. He was prevailed upon, however, to nommate the leading citizen of the United States, George Washington. Franklin's health and the stormy weather prevented him from attending the opening session, and in his stead, Robert Morris of Pennsylvania proposed the name of Washington, and John Rutledge of South Carolina seconded the nomination. Washington was, however, elected unanimously. William Jackson, who had been secretary to Henry Laurens on his mission to France in 1781, did some electioneering among the members and accordingly was chosen secretary. He did his job in a mechanical way, the minutes consisting only of the formal motions and the votes by states.

A committee of three was elected to prepare the rules of

order. The rules adopted were largely those of Congress, which in turn were based upon those of the House of Commons. Two additional features were stressed. First, voting was to be by states. Each state delegation was to have one vote; seven states were to constitute a quorum; and a majority of the states present could decide a question. The equality of states was partly a concession to the delegates from Delaware, who had received instructions not to permit any modification of the principle of equality of states in the new constitution. Second, secrecy was to be preserved. It was decided that no roll calls should be taken, that members only could inspect the journal, and that nothing spoken in the convention should be printed without a resolution to that effect. This was done to protect the members from criticism and to render them free to follow the dictates of their judgment.

The sessions for the most part began at ten or eleven o'clock in the morning and, according to an entry in Washington's diary, sat for not less than five, often six, and sometimes seven hours a day. Except for two adjournments, one for the Fourth of July and the other, of ten days, to allow a committee to prepare its report, the convention sat in continuous session until September 17, Sundays excepted. The members took their work seriously. Gouverneur Morris, Alexander Hamilton, and Madison expressed substantially the same sentiment, namely that they were to decide upon their own future government and upon the fate forever of the republican form of government.

Leaders

Probably no two students of government would agree on who should be included among the five most important members of the convention; much less would they agree on the order of rank Washington may be considered first. He had been commander in chief of the American Army during the Revolution. His campaigns had secured independence and brought peace. No tainted money, no ambition for office, and no questionable commercial transaction could be attributed to him. He had returned to his farm at Mount Vernon content to live the life of a country gentleman. As a presiding officer of the con-

vention he was austere but fair. With Madison's ideas he was well acquainted, for he had borrowed and copied in his own handwriting Madison's notes on the history of federations. Madison's conclusion was that the government should act on the citizen rather than on the component states. Intellectually, Washington was in his prime; he was fifty-two years of age.

Benjamin Franklin may deserve second place. He was a kindly old man and wonderfully active. As a philosopher he enjoyed a reputation that extended throughout the Western world. As a diplomat he had accomplished more than any other person to obtain the aid of France during the Revolution. He made few speeches in the convention but he held the good will and the confidence of the members. William Pierce of Georgia took notes on the personal characteristics of his fellow members. He stated that Franklin "tells a story in a style more engaging than anything I ever heard," and he "possesses an activity of mind equal to a youth of 25 years of age." It was through his common sense, wit, humor, and even temper that Franklin was able to soften the edges of opposition between contending groups and to bring about agreement. That was Franklin's great contribution in the convention.

James Madison was thirty-seven. He was the scholar in politics, a graduate of Princeton, modest, methodical, industrious, with no taste for the life of a soldier. He was the kind of man that high school and college students do not choose as a subject for an oration. Pierce said of him that he was the best informed man of any in debate and that he had a most agreeable style of conversation. He rendered three great services. First, he formulated the Virginia plan, which became the basis for the present Constitution. Second, he furnished a wealth of accurate information on the experience of governments and on the needs of the Americans, which served as a guide for many in the Convention. And third, he sat in front of the presiding officer and took notes. He states: "In this favorable position for hearing all that passed, I noted, in terms legible and in abbreviations and marks intelligible to myself, what was read from the Chair or spoken by the members; and losing not a moment unnecessarily between the adjournment and reassembling of the

Convention, I was enabled to write out my daily notes during the session, or within a few finishing days after its close." These notes, supplemented by the more meager ones of some other members of the Convention, particularly those of Robert Yates, Rufus King, and James McHenry, constitute the chief source material of what took place in the Convention.

William Paterson was about forty-two. Like Madison he was a Princeton graduate and he had not been a soldier in the Revolution. He became the leader of the group that wanted above all to retain the equality of the states. The Articles of Confederation, he thought, should continue as a constitution, with allowance for a few amendments. He represented the losing side and students are prone to undervalue the service of the defeated, not realizing that this opposition is necessary to bring out the fine qualities on the winning side.

Hamilton scarcely deserves to be included among the first five, for he did little in the Convention, although he did later lead valiantly the cause for the adoption of the Constitution in New York. Robert Morris of Pennsylvania had rendered great service as a financier in the Revolution but he was now in straitened circumstances and did almost nothing in the Convention. His kınsman, Gouverneur Morris, wrote the Constitution in its final form and that task was admirably performed. Elbridge Gerry and Rufus King of Massachusetts were able men; so were Roger Sherman and Oliver Ellsworth of Connecticut. William Livingston from New Jersey had first-rate talents. John Dickinson, because of his "Farmer's Letters" during the Revolution and because he had drafted and submitted the report of the Committee on the Articles of Confederation, was considered an important character. Luther Martin of Maryland had solid qualities, although he was somewhat prolix in speech. William R. Davie of North Carolina carried respect when he spoke. The Pinckneys of South Carolina were leaders at home and contributed freely to the deliberations at Philadelphia.

Probably the most deserving of fifth place is James Wilson of Pennsylvania, a Scotchman, educated at the universities of St. Andrews, Glasgow, and Edinburgh. He knew history and political theory as it was taught in Europe, and he supplemented admirably the learning of Madison. Whenever a question arose as to how a principle had worked in practice, he could give on the spot the historical setting and the outcome. No one could focus his attention upon the crux of a question better than he. For consistent and steady work he and Madison shared the honors.

The Virginia Plan

The Virginia delegates realized from the beginning their importance. Daily the members met and perfected a proposal for a new government which Edmund Randolph, Governor of Virginia, introduced on May 29. He summarized the defects of the Articles of Confederation and proposed as a remedy fifteen resolutions, which are in the handwriting of Madison. Three coordinate departments were to be established. Representatives in both houses of Congress should be apportioned among the states according to taxes paid to the United States or according to the number of free inhabitants. The members of the first branch of the legislature should be elected by the people and should receive a liberal salary. The members of the second branch should be nominated by the state legislatures but should be elected by the first branch of the national legislature. Members of neither house could hold any other office under the state or the United States during their term. The national legislature should have power to legislate in all instances in which the Congress under the Articles of Confederation could do so and in cases where the states were incompetent or where the harmony of the United States might require it. There was also a provision for a review by the national legislature of state legislation that might contravene the provisions in the national constitution. Furthermore, the national legislature could use force against a state that failed to fulfill its duty.

The national executive was to be chosen by the national legislature. The number of years in the term was left blank. He and a number of the national judiciary were to constitute a council of revision with a limited veto upon legislation. The veto could be overriden by repassage. The national legislature would have the power to admit territories to statehood.

The judiciary was to consist of superior and inferior courts; the judges of which were to be chosen by the national legislature and serve during good behavior.

Each state was guaranteed a republican form of government. All state officers would be bound by an oath to support the national constitution. Every act of a state legislature should be subject to a negative by the national legislature.

The new constitution should be submitted for approval to the Congress of the Confederation and then to conventions in the states called by the state legislatures. In these resolutions Madison proposed through Randolph such a challenge that the members felt that some better plan would need to be found before the proposal could be abandoned.

The Pinckney Plan

Charles Pinckney then laid before the Convention a plan prepared by himself. He proposed that the states should surrender to each other fugitives from justice. The House of Delegates should be apportioned among the states according to population, three-fifths of the Negroes included. The Senate should be chosen by the House of Delegates. The Executive should have the right to advise with the heads of departments as his council. Congress should have exclusive power to regulate trade and levy duties thereon, to establish post offices, coin money, and fix the standard of weights and measures. Pinckney provided for an appeal from state courts to the federal courts in cases involving treaties, international law, and national regulations upon trade and revenue. Pinckney's plan received no detailed consideration in the Convention; but the points mentioned above show that it did have considerable influence upon the final document.

On May 30 an important step was taken by the Convention. It adopted a resolution to the effect that a national government consisting of a supreme legislative, executive, and judiciary ought to be established.

The Paterson or New Jersey Plan

The first burning issue to confront the Convention concerned the method of apportionment. It was as old as the Articles of Confederation. When Madison and Gouverneur Morris threatened to force a decision, the delegates were reminded by Reed of Delaware that the instructions of the delegates from his state forbade them to vote for any change in the equality of states and that they might be compelled to go home. Action was postponed.

It was readily agreed that there should be two houses in Congress. The next issue of moment pertained to the method of electing Senators and Representatives. Madison, Mason, and Wilson won against Sherman, who declared the people could not be trusted, and Gerry, who felt that the people were the "dupes of pretended patriots." It was decided that the members of the House should be elected by the people. The method of choosing Senators was temporarily left unsettled. It was agreed that either house could originate bills, and that all powers belonging to the old government should be transferred to the new. Even the principle that Congress could nullify a state law that conflicted with the Constitution was adopted.

The small-state men had been swept off their feet. But they were beginning to organize and to propose substitute measures. When the popular election of Senators came up again, Dickinson of Delaware submitted the proposal that the upper house should be chosen by the state legislatures. His measure was adopted.

After the Virginia plan had been substantially adopted in the committee of the whole, Paterson asked for time to prepare and to present another plan. Shortly afterward, the small-state delegates presented the New Jersey plan, largely the work of Paterson. Congress under this plan could regulate foreign and interstate commerce, levy duties on imports, and make requisitions on the states for funds in proportion to population, and, in case of nonpayment, "direct the collection." There was to be a plural executive and an independent judiciary. It was conceded that for noncompliance a state might be coerced; also that acts of Congress and treaties relating to the citizens or the states should be the supreme law of the land, the judges of the several states to be bound thereby. Paterson made the leading speech in favor of the small-state plan in which he contended for an

equal sovereignty of states, the only alternative being to erase state boundaries and set up a centralized state. Fortunately, however, neither alternative prevailed.

Randolph made a plea for a government which rested upon individuals. Coercion of states would be expensive and cruel.

Hamilton's Plan

Alexander Hamilton of New York had remained silent but now he arose and vigorously opposed the New Jersey plan as untenable. He was shrewdly skeptical of the Virginia plan. Then he proposed a plan of his own. The legislature of the United States should have power to pass all laws whatsoever, subject to an absolute veto by the President. The members of the lower house should be elected by the people for three years. The Senators were to be chosen by electors who were to be elected by the people of the states and should serve during good behavior. The Senate should have sole power to declare war and to pass upon treaties and upon appointments, with the exception of the heads of finance, war, and foreign affairs.

The executive should serve during good behavior and should be chosen by electors who were to be elected by the people. In case of a vacancy the President of the Senate should succeed. The executive should have an absolute veto and the sole power of appointing the heads of finance, war, and foreign affairs. He could pardon all offenses except treason, which he could pardon only with the approval of the Senate.

The judges of the Supreme Court should serve during good behavior. The governors of the states should be appointed by the general government.

Hamilton avowed that the British government was the best in the world. His speech and his proposal had made it clear to the delegates that the Virginia plan occupied a safe and constructive middle ground and that the Paterson and Hamilton plans occupied the extremes.

Madison applied his knowledge and his logic to an analysis of the Paterson plan and showed how it failed to meet the needs of the moment. The committee of the whole decided to adhere to the Virginia plan as preferable to the New Jersey plan. After being in session for three weeks the committee of the whole voted to rise and report to the house in plenary session.

The Compromises

Each clause of the report was again taken up and debated, and in many instances features of the Pinckney, Paterson, and Hamilton plans were woven into the structure. In several instances the parties had to yield. This resulted in compromises, a not unusual feature in any legislative chamber.

On the knotty problem of apportioning Senators and Representatives, Johnson of Connecticut did not make bold assertions but tactfully asked if there would not be much gained by apportioning Representatives among the states according to population, and by preserving the equality of the states in the Senate. His colleague, Sherman, worked toward that end with skill, patience, and good temper. On the apportionment of Senators the vote was equally divided and the delegates voted to refer the matter to a committee to be elected by the convention. Madison and Wilson feared defeat and fought the subterfuge of a committee report but lost. After the adjournment for the fourth of July, the committee reported on July 5 in favor of proportional representation in the House, that body to have power to originate revenue bills, and in favor of equality of the states in the Senate. The report was adopted on July 16 after a long debate by a vote of five state delegations to four, one state being divided. It was later moved and carried to give each Senator one vote. This may be called the first great compromise. Wilson clarified the situation considerably by proposing to do away with the use of force against a recalcitrant state. He pointed out that there would be no need of it because a state government would occupy its sphere of action and the United States government another sphere of action. He paved the way for the most remarkable clause in the Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby..." (Article VI). This clause enables the governments of the states and of the United States to operate in a legal sense almost without friction, for it follows that both governments, state and national, operate directly upon the citizen.

The organization of the judiciary caused no serious disagreement, but considerable time and care were used in drafting the provisions. Although no express provision appears in the Constitution that the three departments are coordinate in character, the Convention made it clear that such was the intent of the delegates.

While agreements were being rapidly adopted, differences appeared on other points. The Northerners felt that slaves should not be counted in the apportionment of Representatives. If the slaves were to be counted, Gouverneur Morris contended that they should be included in the apportionment of taxes as well. Mason of Virginia pointed out that customs duties and indirect taxes could not be thus apportioned and suggested that the rule be applied to direct taxes only. Davie of North Carolina said that his state would never enter the Union unless three-fifths of the slaves were counted. Wilson asked why they were not admitted as citizens. If they were admitted to representation as property, why not other property as well? As a result the following clause was adopted without mentioning slaves: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons" (Article I, Section 2). This was the so-called three-fifths compromise.

Another difference of opinion cropped out between the North and the South over the regulation of commerce and the foreign slave trade. Mason saw that the Southern states would occupy a minority position in both houses of Congress and apprehended that the Northern states would use the power to control commerce to their own purposes. Gorham of Massachusetts as-

serted frankly that the only motive for union was the commercial one. Later events proved that both views were well founded. The monopoly imposed on coastwise shipping and the restrictions on foreign vessels favored the North as did the various protective tariffs, especially the one of 1828.

On the foreign slave trade the New England men were divided. That section derived considerable profit from this traffic. The delegates from Virginia, Maryland, Delaware, Pennsylvania, and New Jersey were opposed to the importation of slaves. Charles Pinckney thought that in due time the Southern states would automatically stop importation, and that any attempt to enforce restriction might endanger the acceptance of the Constitution. Madison thought it wrong to admit that there could be property in men. Mason of Virginia, a large slaveholder, announced: "As nations cannot be rewarded or punished in the next world they must be in this. By an inevitable chain of causes and effects providence punishes national sins, by national calamities." The whole problem was referred to a committee. The report favored the abolition of the foreign slave trade in 1808, with the provision that in the meantime Congress might impose a tax of ten dollars for each slave admitted. It recommended that Congress should have full powers to regulate foreign and interstate commerce and commerce with the Indian tribes. The problem of commerce had been troublesome under the Confederation, and, in spite of this compromise, was to continue dangerously so until after the Civil War.

Many resolutions were passed and rescinded on the method of electing the President. If he were to be chosen by both houses of Congress, the executive would become subordinated to the legislative branch. On the other hand, to trust the voter seemed beyond comprehension. This question brought again into play the antithesis between the large and the small states. A committee was appointed which reported, September 4, that each state should appoint Presidential electors in such manner as the state legislature should direct. The number from each state was to be the same as that of Senators and Representatives in Congress. Each elector should vote for two persons. The one receiving the highest number, if a majority, should be President

and the next highest Vice-President. If no candidate received a majority the election should devolve on the Senate. Wilson said that if this report were adopted the President would become the minion of the Senate. The report was therefore modified to leave the election, if the electors failed, to the House of Representatives, each state delegation having one vote. The report was adopted. This method of electing the President, much debated and many times voted on, proved to be the least enduring of any of the provisions in the Constitution.

The Constitution Adopted

As the Convention neared its close, doubts, acrimonies, and opposition to parts of the Constitution appeared. Franklin accomplished wonders in his self-imposed office of promoting good will and support for the Constitution. Martin of Maryland consumed hours in arguing that the states were sovereign, refused to sign, and went home to lead the opposition to the document. Mason protested bitterly against the commerce clause, which would enable a few rich merchants of the North to monopolize the products of the South. He refused to sign. So did Governor Randolph. Gerry would not sign. Of seventy-four delegates appointed to the Convention, only fifty-five had attended and only thirty-nine signed the Constitution. Rhode Island had sent no delegates. Those from New Hampshire came very late. In order to give their work an appearance of solidarity, Franklin proposed the following equivocal form of ratification: "Done in Convention by the Unanimous Consent of the States present. . . . " This was adopted. The Constitution with an accompanying letter from George Washington was then submitted to the Congress of the Confederation, sitting in New York.

Thus the Constitution of the oldest living republic today had an apparently inauspicious origin. Conflict, doubt, dissension, and weakness had marked its birth. Withal many of the delegates had seen the light, and opposition from the others had made the light more clear. The needs of the hour were apparent. The experiences of Greece and Rome, of Holland and

Switzerland, of the Holy Roman Empire, of England, and above all of the thirteen colonies and, since 1776, of the thirteen states, had been studied and evaluated. Possibly the constitution of Massachusetts of 1780 and the Articles of Confederation furnished more of the ideas that went into the Constitution than did any other documents. Scarcely a provision appeared in the Constitution but had been tested by American experience.

The Constitution Ratified

The Congress under the Articles of Confederation voted to submit the draft of the Constitution to the several legislatures to be submitted to a convention of delegates in each state. During the period required for the election of delegates and the interval before the meetings of the conventions an immense amount of writing and speaking took place on the merits and demerits of the Constitution. The debtors, of whom there were many, opposed the hard money provisions. Many feared the power to tax and to regulate commerce. Because of the recent Shays' Rebellion, Massachusetts was uncertain. In New York George Clinton and the state officeholders led the opposition. In Virginia Patrick Henry and George Mason opposed the document.

The convention in Pennsylvania met November 21, 1787. That there was no bill of rights, that elections did not come annually, and that there was no guaranty of jury trial in the federal courts constituted the chief objections. James Wilson led those who favored the Constitution. Benjamin Rush felt that a bill of rights was unnecessary. The debate lasted for three weeks. Fifteen amendments were drafted, the substance of which was later incorporated in the Bill of Rights. The convention voted its approval December 12.

The convention in Delaware held a short session and reached a favorable conclusion December 7. New Jersey ratified December 18. Georgia followed on January 2, 1788. Connecticut approved January 9. Massachusetts had a long fight. Finally, the representatives of business and property won on February 6, with Rufus King, Samuel Adams, John Hancock, and James

Bowdoin as the leaders. Maryland ratified on April 28. South Carolina followed May 23, and New Hampshire joined the ranks as the ninth state June 21, 1788. According to the seventh article of the Constitution the ratification of conventions in nine states should be sufficient to establish the Constitution between the states so ratifying, but that does not mean that the Constitution went into effect on June 21.

In Virginia and New York the fight took on a desperate aspect. It was recognized, too, that an effective union could hardly exist without these states. In Virginia James Madison and John Marshall led the fight for the Constitution. Washington was not a member of the convention but he worked effectively. George Mason was not a member but because of his pique against Washington he worked energetically against it. Patrick Henry and James Monroe led the opposition. Henry wanted a bill of rights or another federal convention. Madison conceded that amendments should be submitted in the proper manner after ratification and drafted several of them. By a vote of eighty-nine to seventy-nine Virginia approved June 25, 1788.

In New York the delegates from the cities, as was usual the country over, favored the Constitution. The farmers and debtors were in the opposition. A large number of officeholders received fees from the collection of import duties on goods that went to New Jersey, Connecticut, Vermont, and even western Massachusetts, and these men feared the new government that would be set up, because it might remove them. In order to answer arguments of the opposition and to build up sentiment, Hamilton asked Jay and Madison to join him in writing a series of papers in defense of the Constitution. Jay wrote five essays on the control of foreign affairs. Madison discussed in twentynine essays the framework of the government, the separation of powers, and the system of representation. Hamilton produced fifty-one essays on the necessity of regulating interstate and foreign commerce and the need for a strong executive and an independent judiciary. To what extent these papers, later collected and called the Federalist, influenced the crisis in New York cannot now be measured. Certain it is that Hamilton and Jay clarified their own thoughts and convinced the ablest minds in that state. The *Federalist* has since become a primary source on the meaning of the Constitution. British universities prescribe the reading of the *Federalist* by their undergraduates as one of the world's outstanding works on political science.

When the convention assembled in June, 1788, at Poughkeepsie two-thirds of the delegates were opposed to the Constitution. News came that New Hampshire had ratified. Early in July they knew that Virginia had approved. The opposition demanded a bill of rights, and Hamilton agreed to support such a measure in the form of amendments. The convention passed a resolution asking for a second federal convention. Then the resolution to ratify was adopted July 26, 1788, by a vote of thirty to twenty-seven, a close but distinct victory.

The ratifications were duly reported to Congress. That body set the first Wednesday in January, 1789, as the day for appointing Presidential electors. On the first Wednesday in February, the electors were to assemble in their respective states and vote for a President. The first Wednesday in March was set as the day for commencing proceedings in New York under the new Constitution.

North Carolina and Rhode Island

In North Carolina the delegates in opposition to the Constitution dominated the state convention. They wanted a bill of rights and a second federal convention, and the best way to achieve that end, they thought, was neither to ratify nor to reject the Constitution as it stood. Apparently they had no plan of setting up an independent state, for they resolved to collect the same import duties as the new Congress should prescribe and to turn the proceeds over to the new government. However, a second convention meeting at Fayetteville in November of 1789 speedily ratified the Constitution by a vote of 195 to 77.

In Rhode Island the party in favor of the continued use of depreciated paper money controlled the situation. Moreover,

an intense hostility had developed between the farmers and the merchants. The result was that when the legislature submitted the Constitution to the towns for a referendum vote the Anti-Federalists cast an overwhelming vote and the Federalists remained at home. Not until 1790 did Rhode Island see fully the folly of cheap money and appreciate the blessings that flowed from the new government. Twice did the legislature repudiate the old issue of paper money and authorize a new one. The legislature called a convention to meet in January, 1790, which failed to ratify the Constitution. Another convention met in May and ratified it by a majority of two. The new order had now been accepted by the people in all of the states.

The Constitution Effective

The question is often raised, When did the Constitution go into effect? Was it when New Hampshire, the ninth state, ratified on June 21, 1788? Was it on the first Wednesday in March, 1789, that is, March 4? Or, was it when Washington was inaugurated as President, April 30, 1789?

John Marshall as Chief Justice of the Supreme Court answered this question in the case of Owings v. Speed in 1820. Owings had obtained in 1785 from the state of Virginia a patent to a thousand acres for a town site in the district of Kentucky. then a part of the state of Virginia. In 1788 the legislature of Virginia passed an act taking back one hundred acres of this tract to be laid off into lots, some of which were to be given to settlers. Speed and others obtained these lots, and Owings brought suit to eject them. Under the Articles of Confederation a state would be under no restriction. But if the Constitution had gone into effect this act of the legislature would contravene the provision to the effect that no state shall pass any law impairing the obligation of contracts, and Owings would be entitled to the whole one thousand acre tract. Marshall handed down the decision for the Supreme Court holding that the Constitution went into effect the first Wednesday in March (March 4), 1789, the day set by the Congress under the Articles of Confederation for the new government to become operative. Owings lost the suit.

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CHAPTER IV

Changing the Constitution

Four Methods of Amendment

The Constitution provides means for its own amendment. In addition, legislative enactment and judicial interpretation have in fact been used to bring about a governmental machinery very different from anything envisioned by the framers. Moreover, custom has set precedents which are as important as any of the provisions of the Constitution itself.

Article V of the Constitution provides that an amendment may be proposed by a two-thirds vote in each house of Congress or by a convention called by Congress upon the application of the legislatures of two-thirds of the states. The amendments must be ratified by the legislatures of three-fourths of the states or by conventions in three-fourths of the states. Congress determines which method of ratification shall be used. Since either method of proposing amendments may be combined with either method of ratification, a total of four combinations or plans of bringing about amendments is possible. As a matter of fact only two methods of amendment have been used: first, proposal by a two-thirds vote in each house of Congress and ratification by three-fourths of the state legislatures, and second, proposal by a two-thirds vote in each house of Congress and ratification by conventions in threefourths of the states. The latter method has been used only once. This was in the repeal of the Eighteenth Amendment, constituting the Twenty-first Amendment.

The Bill of Rights

The first ten amendments are commonly known as the Bill of Rights. Of these, the first eight constitute limitations upon the federal government in its relations with individuals, and the Ninth and Tenth lay down a rule of construction in respect to individual rights.¹

The Eleventh Amendment

The Eleventh Amendment was adopted to correct the effects of the decision of the Supreme Court in the case of Chisholm v. Georgia, which had held that the federal courts had jurisdiction over cases brought by the citizens of one state against another state. The Eleventh Amendment took away this jurisdiction.²

The Twelfth Amendment

The Twelfth Amendment was adopted to correct a defect that had developed in the Constitution as a result of the development of political parties. The original Constitution had not provided for separate votes for President and Vice-President, with the result that the candidates of each party for President and Vice-President received the same number of votes in the electoral college. The Twelfth Amendment provided for separate votes for President and Vice-President.³

The Amendments Growing Out of the Civil War

The Thirteenth, Fourteenth, and Fifteenth Amendments were products of the Civil War. The Thirteenth abolished slavery and involuntary servitude.⁴

The Fourteenth Amendment provided a new rule upon citizenship, protected individuals from denial by the state of due process of law or equal protection of the laws, and provided a new rule of apportionment for Representatives in Congress.⁵

This amendment also provided for the exclusion from Congress and from federal office of former officers and members of Congress who had taken part in the war on the Confeder-

¹ See pp 511, 524.

² See p 186.

⁸ See p 137.

⁴ See p 529

⁵ See pp. 87, 209, 464, 531.

ate side, although Congress was authorized to remove this restriction by a two-thirds vote. In addition the debts acquired by the states in support of the Confederate cause were made illegal and void.

The Fifteenth Amendment prohibited denial of the suffrage because of race, color, or previous condition of servitude.

The Sixteenth to the Twenty-first Amendments

The Sixteenth Amendment authorized income taxes without apportionment;⁷ the Seventeenth provided for the popular election of Senators;⁸ the Eighteenth prohibited the manufacture, sale, or transportation of intoxicating liquors for beverage purposes; the Nineteenth granted the suffrage to women;⁹ the Twentieth provided changes in the dates for the beginning of a new Congress and the beginning of the Presidential term, and made provision for the failure of the electors or the houses of Congress to choose a President or Vice-President;¹⁰ and the Twenty-first repealed the Eighteenth Amendment, but prohibited the transportation of intoxicating liquors into any state in violation of its laws.

Proposals for Amendment

Considerable repetition over a period of time is likely to precede favorable action upon a proposed amendment. The popular election of Senators was proposed as early as 1826. H. V. Ames finds that at least thirty resolutions on the popular election of Senators were introduced up to 1889 and C. C. Tansill lists one hundred forty-five resolutions on the same subject between 1889 and 1912. The Seventeenth Amendment was adopted in 1913. The income tax amendment had been introduced in either house of Congress forty-five times between 1896 and 1913 when it was adopted and became the Sixteenth Amendment. The substance of the Nineteenth Amendment was intro-

⁶ See p 464

⁷ See p 226

⁸ See p 120

⁹ See p 467

¹⁰ See pp 74, 135

duced in either house one hundred and fifteen times before it became law in 1919.

Other propositions have been introduced many times without success, such as proposals for placing restrictions on child labor, for the prevention of lynching, for rendering property as well as man power liable to conscription in time of war, and for giving the people of the District of Columbia the right to vote. A national referendum on laws declared unconstitutional has been proposed several times. The proposal for direct election of the President by popular vote has taken various forms and has been introduced probably seventy-five times. The conferring of the partial veto upon the President has been introduced at least fifty-five times. After the defeat of the Treaty of Versailles by a narrow margin in the Senate, a resolution providing for the ratification of treaties by a majority vote in the two houses was introduced several times.

Constitutional Questions Affecting Amendments

In connection with the Eighteenth Amendment a number of Constitutional questions affecting its validity were raised. Some of these were new and some were questions that had been raised in older cases. In the National Prohibition Cases, it was contended that the Eighteenth Amendment was invalid because it had been proposed merely by two-thirds of a quorum in each house of Congress. It was argued that the "two-thirds" required in the fifth article meant two-thirds of all the members elected to each house. The Supreme Court found that this question had already been answered in an earlier case and meant two-thirds of the members present, assuming the presence of a quorum.

In these cases it was also brought out that the Missouri legislature had ratified the amendment in spite of the fact that the state constitution forbade that body to do so without a referendum, and that the ratification by the legislature of Ohio had subsequently been rejected by the people at the polls. The Court found that the act of ratification was one the state legislature could not delegate, that referendum provisions of state

constitutions could not be applied, and that an act of ratification could not be withdrawn.

It was further contended that the power to amend meant the power to correct errors and oversights committed at the time of the formation of the Constitution and did not extend to the invasion of the police powers of the states and the direct encroachment upon the right of local self-government—in fact that the amendment constituted a subversion of the federal system of government. The Court found that the scope of the amendment came within the amending power of the Constitution and that it must be respected and given effect like other provisions of that instrument. The Court found further that the first section, the one embodying prohibition, was operative throughout the territorial limits of the United States and was binding upon all officers and individuals within those limits.

The "concurrent power" between Congress and the states raised another question. The Volstead Act forbade the manufacture, sale, and transportation of liquor for beverage purposes, with an alcoholic content above one-half of one per cent. The Volstead Act conflicted with many state laws which permitted alcoholic drinks up to a content of 2.75 per cent and even 5 per cent. Counsel contended that it could not mean that if there were conflict, the action of Congress must control, for that would plainly be to say that the power of the states was not concurrent, but subordinate, and in effect no power at all. The Court found that Congress and the states could enforce prohibition by appropriate means and that neither could use this power to defeat or thwart prohibition. Concurrent power did not mean joint power so that an act of Congress to be effective would need to be approved by the states. The power confided to Congress, though not exclusive, was territorially coextensive with the United States and was in no way dependent upon or affected by action or inaction by the several states. The Eighteenth Amendment and the Volstead Act were upheld in full.

A Constitution for the Future

As pointed out at the beginning of this chapter, the Constitution has been developed not only by formal amendment, but also by other means. Laws passed by Congress may be necessary to fill the gaps in the Constitutional provisions. A good example would be the Presidential Succession Act. 11 Often acts of Congress are necessary to meet changed conditions not contemplated by the framers of the Constitution. It is here that the courts usually enter upon the scene. They might hold such acts unconstitutional. As a matter of fact the courts have permitted a wide expansion of federal powers. Thus, the Constitution has been expanded to cover matters that the framers could not well have foreseen. It does not follow, however, that the framers did not expect that the Constitution would be liberally interpreted. They were conscious of the fact that they were drawing up an instrument for the future. In the great case of Mc-Culloch v. Maryland, Chief Justice Marshall argued that they contemplated a liberal interpretation of federal powers. "In considering this question, then, we must never forget, that it is a constitution we are expounding," said Marshall. It was a document to be adapted to the changing needs of the nation.

Examples of Constitutional Interpretation

One of the best examples of the adaptation of the Constitution to changing conditions has been the interpretation of the commerce clause. The Constitution states that Congress shall have the power to regulate commerce with foreign nations and among the several states. The Supreme Court has upheld as within the scope of this clause acts passed by Congress pertaining to the regulation of interstate and foreign commerce by steamboat, by railway, by telegraphy, by airplane, and by radio. These means of communication were unheard of in 1787. At the same time Congress has been permitted to exclude from interstate commerce various commodities such as lottery tickets and materials for making counterfeit money.¹²

The doctrine of implied powers rests on judicial interpretation. The power to charter the Second United States Bank, as shown by McCulloch v. Maryland, proceeded from other powers, such as the power to collect taxes, to borrow money, and to reg-

¹¹ See p 136

¹² See p 569

ulate the value thereof.¹³ Nowhere does the Constitution authorize Congress to provide for the issue of paper money. Yet, as a power implied from certain express powers, it is now held that Congress may do so.14

The war power of the federal government has been greatly extended. By Constitutional provision the power to declare war rests with Congress. But in the Prize Cases it was held that President Lincoln could by proclamation of a blockade bring about a recognition of war. Under the war power, Congress may impose a selective draft upon the men of the country, place the population of the country under rations, and fix prices.

The courts have decided that a state may not tax a national function, and that the United States may not tax a state function, since the power of taxation might otherwise be used by one government in such a way as to destroy the other or impede it in the performance of its powers. 15 The courts hold that not only federal but state taxes are invalid if levied for anything other than a public purpose.16 These are limitations not mentioned in the Constitution on federal and state powers.

Not until the Supreme Court had spoken in Downes v. Bidwell did it become clear that the limitations of the Constitution upon Congress do not always apply in certain of our territories, and that we cannot say that "the Constitution follows the flag." 17

These examples are sufficient to show that we cannot know what our fundamental law is until the courts have spoken. As we proceed we shall see that judicial decisions constitute a very important part of our Constitutional system.

"Conventions" of the Constitution

Writers on British government mention "conventions" as constituting an important part of the constitution. It is a "convention" that the King does not exercise the veto on legislation; and that he does not personally exercise the pardoning power or

¹³ See p 643

¹⁴ See p 639

¹⁶ See pp 223, 382

¹⁷ See p 252.

any of the direct powers of government, except that when the cabinet fails to command a majority support he designates the leader of the opposition to form a new cabinet. The practice of the cabinet to resign or to appeal to the country when defeated in the House of Commons upon important legislation is also one of the many conventions or customs of the British constitution. These customs have no legal significance in the sense that they would be recognized by or could be enforced through the courts, yet normally they are observed as faithfully as though they were written into law.

Similarly, a vast amount of custom and tradition has grown up in the practices of American government; so much so, that we are obliged to recognize custom as, in effect, a method of changing the Constitution. It was hardly anticipated that the President should have not more than two terms of office, yet the precedent set by the first President in refusing a third term has been a powerful factor in preventing a third term for any of his successors. It was certainly thought in the Convention of 1787 and by the members of Congress in proposing the Twelfth Amendment, that the electors should use their discretion in voting for President. Yet the electors from the beginning have carried out the desires of their constituents. At the most only one or two exceptions have occurred, as in the erratic action of William Plumer of New Hampshire who in the second election of Monroe voted for John Quincy Adams because he wanted Washington to be the only President unanimously elected.

Political Parties

Political parties are not mentioned in the Constitution <u>nor did</u> the laws of the United States mention them until 1907. President Washington deprecated political parties and avowedly brought the leaders of different groups into the cabinet and sought to iron out their differences at the cabinet meetings. The whole structure and the body of practices of political parties have grown up outside of the Constitution. Yet now it is recognized that the government could hardly function without political parties. In fact, the President has become the leader of his

party and as such he wields immense influence over legislation and administration.

Succession of the Vice-President to the Presidency

The Constitution provides in the case of the Vice-President succeeding to the Presidency that the duties shall "devolve on" him (Article II, Section 1). It refers to times when the Vice-President "shall exercise the Office" of President (Article I, Section 3). In case of the removal, death, resignation or inability of both President and Vice-President the successor is to "act as President" (Article II, Section 1). It does not say that the Vice-President or his successor shall be President. This question caused serious discussion in the two houses of Congress and among party leaders when William Henry Harrison died. With a confident gesture Tyler dispelled doubt by sending a message to Congress signed: "John Tyler, President." Ex-President John Quincy Adams recorded in his memoirs, April 7, 1841, that the "Acting President" attended Harrison's funeral and again that the death of Harrison made John Tyler "Acting President of the Union for four years less one month." Practice has in this regard sustained President Tyler.

The Negotiation of Treaties

The Constitution states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make treaties. . . ." (Article II, Section 2). President Washington understood this to mean that he was to appear before the Senate and actually advise with the Senators. He did so and was met with so much delay that his patience was tried and thereafter he decided to negotiate the treaties in full and submit the documents to the Senate for such deliberation and action as it saw fit. This has become the established practice.¹⁸

The Cabinet

The President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any

¹⁸ See p 151.

Subject relating to the Duties of their respective Offices. . . ." (Article II, Section 2). This clause has become the Constitutional basis for the cabinet meetings in so far as they have a basis in any particular clause of the Constitution. As a matter of fact, the cabinet in this country exists only at the will of the President, who may accept or reject its advice as his own judgment dictates, or may neglect to call it together if he so pleases.

Other Customs and Conventions

Other vital changes in the Constitution that have been brought about through custom are the power of the courts to refuse to enforce statutes which they consider unconstitutional, Senatorial courtesy in connection with appointments, the origination of the large appropriation bills by the House of Representatives, the caucus of the members of each party in either house of Congress, and the almost universal practice of electing to Congress only residents of the districts to be represented.

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CHAPTER V

Congress

The Structure of Government to Be Studied First

The Constitution sets up the bare outline of the federal government. Legislative enactment, judicial construction, and custom have supplemented this with the details that make it an effective machine. To understand the governmental organization of the United States, therefore, it next becomes necessary to examine in more detail the structure of the various departments of the federal government, and after that, of the states. A study of the forces, such as political parties, that put this governmental machinery into motion and formulate its policies, may be reserved until later, and subsequently it will be possible to undertake an examination into the way in which this working machine of federal and state governments is functioning upon the actual political problems of our day.

The Evolution of Parliament

In analyzing the structure of the federal government the first department to be studied is the legislative. Modern democratic governments have evolved from medieval systems chiefly through the growth in powers and increase in the representative character of the legislature.

This evolution is best exemplified in the development of the British system. Whatever the earliest origins of Parliament may have been, we know that in the second half of the 1200's Parliament began to take on its present form. In a series of Parliaments called by various rulers, the knights of the shires, representing the smaller landed interests, and the burgesses of the towns, representing the commercial class, were added to the

clergy and barons of the older Parliaments. If medieval ideas had been followed, Parliament would have developed into three houses, representing clergy, barons, and commons, the knights joining with the barons with whom they belonged according to feudal theory. Instead, the clergy, in time, withdrew to their own convocations, except for the archbishops, bishops, and a number of abbots, who, as great landholders, remained with the barons; while the knights joined with the burgesses; leaving Parliament with a bicameral form. In this way, the medieval idea of "three estates" was left behind.

Parliament very early began to grow in power, for since the king needed the support of the country in the levying of taxes he was under the necessity of making concessions to Parliament. There are many phases to the centuries of struggle that followed. A great step forward was procedure by bill, under which, instead of merely petitioning the king to issue a law, Parliament framed the law itself, leaving to the king only the choice between signing or refusing to sign. After this it was no longer possible for the king, after promising to grant a petition, to neglect to issue the promised law or modify its terms. When there was added to legislation by bill the understanding that the king would choose his ministers in accordance with the will of Parliament, and that he would act only upon the advice of these ministers, the victory of Parliament was complete. The British system of government is based upon the idea of the supremacy of the legislature, and at present this means the popular branch of the legislature.

The Separation of Powers

Our Constitution was framed while the evolution of the parliamentary system in England was still in progress. It was not evident to the men of the Constitutional Convention that the British plan that was soon to take definite form would be based upon a union between the popular branch of Parliament and the executive, so that the cabinet, which is virtually a committee of the House of Commons, exercises in actual practice, the powers of the executive. The House of Lords has been reduced to a subordinate position. Thus, the British system is based upon the

The framers of the Constitution could not foresee that this type of government was to evolve in Great Britain. The current theory of the time was that successful government must be based upon a separation of executive, legislative, and judicial powers. The British system seemed to be based upon this principle. Montesquieu's Spirit of Laws, widely read in this country, had found the superiority of the British system to lie in its application of this principle of the separation of powers. Therefore, they based their Constitution upon this principle, elaborated into a system of "checks and balances," in which the exercise of a power by one department was limited by powers of the other departments. Thus, the power of the legislature to pass laws is limited by the Presidential veto, and the President's power of appointment is limited by the need of Senatorial approval. Some state constitutions, in addition to setting up the three departments and a system of checks and balances, also

contain a "distributing clause," providing that no one of the departments shall exercise powers of the others. In such states the courts are likely to be especially careful not to permit encroachments of one department upon another. The federal Constitution contains no such clause, but nevertheless encroachments by one department on another are not permissible according to Constitutional theory. In practice, it is not possible always to prevent one department from exercising powers of the others. For instance, the President's ordinance-making power is, in fact,

Early Faith in the Legislative Branch

a subordinate lawmaking power.

In the struggle between king and Parliament, the colonists in general had been on the parliamentary side. The men of the American Revolution and the period that followed were familiar with the theories of John Locke,1 who not only put in classic form the doctrine of revolution but placed the legislative first in importance among the powers of government. So it is not by accident that the Constitution places the legislature first in order among the three departments.

¹ See p 10

Recent Decline

In recent years, however, there have been indications of a decline in the importance of legislatures. In America the executive is being looked to more and more to take the leadership in legislation, while many other countries have witnessed the establishment of dictatorships. Much of this decline in importance may be due to transient circumstances, and probably is only temporary. Lawmaking by elected representatives of the people would appear to be the best plan of government that so far has been a devised.

Functions of Legislatures

The most obvious function of a legislature is to make laws. But most of the so-called "laws" of legislatures are not "laws" in the sense that they are rules to govern the conduct of the people. They are appropriation bills, private bills, directions to officers, and the like. Only a small part of the time of a legislature is taken up in the consideration of "legislation" in the proper use of that term. One of the most important of the functions of a modern legislature is to call the attention of the public to the policies and actions of administrative officers and to subject those policies and actions to criticism. Another is to conduct investigations into alleged abuses within the administration.

Among the functions that a modern legislature may perform are: (1) lawmaking; (2) criticism of the executive; (3) formation of public opinion; (4) acting as controlling authority for the administrative bureaus; (5) removal of officers through impeachment; (6) performance of certain executive functions, as in treaty making and appointments, (7) taking part in the process of amending the constitution; (8) passing upon the qualifications of members-elect; (9) expelling members; (10) in cabinet-governed countries, expressing confidence or lack of confidence in the ministry. All of these functions except the last are performed by one or both branches of our Congress.

Some functions that played very little part in the early history of our Congress have grown greatly under modern conditions, so

that Congress occupies a somewhat different position from the one that the framers of the Constitution had in mind.

The Bicameral System

The bicameral or two-chambered form of legislature is found in nearly all modern countries. In the early history of legislatures it was by no means certain that this would be true. The British Parliament might easily have grown into a body of more than two chambers. The French States-General retained throughout its history the three-chambered form, representing the three estates of France. Sweden once had a four-chambered legislature.

Some of our early Colonial legislatures owed their bicameral form in part to the fact that they grew out of trading companies; the upper house came from the board of directors and the lower house from the stockholders. More generally, the upper house represented the interest of the king, and the lower the interest of the colony. The influence of the English example may also have played a considerable part with them. The framers of the Constitution were presented with various arguments in favor of a bicameral Congress—as that one house would be helpful in checking hasty legislation from the other. No doubt they were also influenced by the British example, and even more by the fact that most of the colonies had a bicameral form. But the really basic reason for adopting the bicameral idea was the necessity of representing different or conflicting interests. These were the interests of the large states on the one side and the interests of the small states on the other. The bicameral Congress, therefore, was a compromise in which the Senate embodied the small states' idea of representation of states, and the House of Representatives the large states' idea of representation of population. Fundamentally, therefore, we adopted the bicameral form for the same reason that the British Parliament assumed that form. In each case it was due to the need of representing different or conflicting interests. In England it was classes that must be brought together. In America it was states.

The Meeting of Congress

The Constitution originally provided that the Congress should meet on the first Monday in December of each year unless Congress should by law fix another day, although the President was given power to call one or both houses in extra session at other times. The first Wednesday in March (March 4), 1789, was the the day set by the Congress of the Confederation for the meeting of the first Congress under the Constitution. Due to the absence of a quorum the first House of Representatives did not organize until April 1, and the Senate not until April 6. Washington was not inaugurated until April 30, the further delay being due to the need of counting the electoral vote and sending the notification to the President-elect, who then had to travel from Mount Vernon to New York where he took the oath of office. Subsequent Congresses and Presidential terms have begun on the fourth day of March, dating from the day originally fixed for the meeting of the first Congress.

By law, members of both houses are chosen on the Tuesday after the first Monday in November. An exception was subsequently permitted in the case of states which would need to make changes in their constitutions in order to comply with this law. This explains the case of Maine, where the elections are held in September. Therefore, members of Congress, elected in November, came into office the next March, but did not ordinarily meet in session until the following December, thirteen months after election. Their first session would last until some time in the summer and was known as the "long" session. The second session began on the first Monday in the following December but came to an end on the fourth of the next March with the close of that Congress. This was known as the "short" session. Meantime, in the preceding November, before the opening of the short session, a new Congress had been chosen, which came into office on the fourth of March, and the cycle began again. A member of Congress, then, normally waited more than a year after election before he began to serve, while the incumbent "lame duck," defeated at the polls, served for the "short"

term after he had been rejected by his constituents in favor of the other candidate.

In the early history of the country there was excuse for some of this delay. It was no small matter for Congressmen to make the trip to Washington. Moreover, a period had to be allowed for the Presidential electors to meet and choose a President and Vice-President, and to notify them of their election. Probably there was never any justification for so long a delay. Under modern conditions there is no need to allow a long time to prepare for the trip to Washington, and, as for the electoral college, it merely registers the people's choice. The argument that the people should have time to "cool off" before their representatives could pass laws does not appear to have had much influence on the framers.

In order to adjust the Constitution to modern conditions and to abolish the "lame-duck" session, the Twentieth Amendment, ratified in 1933, provides that the terms of the President and Vice-President shall end at noon on the twentieth day of January, and the terms of Senators and Representatives at noon on the third day of January. Congress assembles each year at noon on January 3, unless by law it appoints a different day. There is no "short session." There will be no "lame-duck" session unless the session beginning on January 3 should run beyond the November elections or a special session should be called in November or December after the elections. The meeting of a new Congress some seventeen days before the Presidential inauguration gives time for the counting of the electoral vote, and, if necessary, the choice of a President and Vice-President in the event of the failure of the electoral college to do so. This interval also permits Congress to elect officers and organize its committees in time to begin its legislative program immediately upon the inauguration of the new President.

In addition to the "regular" sessions, the President may call special sessions of Congress or may call special sessions of one house alone. It was customary before the adoption of the Twentieth Amendment for the outgoing President to call a special session of the new Senate to meet on March 4 so that the new President could make his cabinet appointments immediately

upon coming into office. When Congress meets in special session it does not limit itself to the matters for which it was called, but may proceed to other subjects. The President cannot adjourn or prorogue the houses in either a special or regular session unless the houses disagree upon the time of adjournment, in which case he "may adjourn them to such Time as he shall think proper . . ." (Article II, Section 3). It is not possible for the members by petition or any other method to bring about a special session, as it is in some of the states, even for the purpose of impeaching and trying the President. Neither house may adjourn for a period of more than three days without the consent of the other. Neither house may adjourn to "any other Place" than the one in which the two houses shall be sitting (Article I, Section 5).

Voting in Congress

The Constitution states that the quorum for each house shall be a majority (Article I, Section 5), and this is held to be a majority of those elected, sworn, and living, and whose membership has not been terminated. A smaller number may adjourn from day to day and compel the attendance of absent members. Ordinarily, decisions are reached by a majority vote, but the Constitution requires two-thirds in certain cases. When the vote is by individuals, this means a majority or two-thirds of those voting, provided a quorum is present. On votes by sound of voices a quorum is assumed to be present unless a count 18 demanded by a member. A recorded vote by yeas and nays may be demanded by one-fifth of those present (Article I, Section 5), and at this time, and when voting by tellers, a quorum must appear on the count. When the House of Representatives is voting by states in the choice of a President, two-thirds of all the states must concur.

Privileges 🗸

By Constitutional provision (Article I, Section 6), members of Congress are privileged from arrest during attendance upon sessions of their respective houses and in going to and returning from the same, except in cases of treason, felony, and breach of

the peace. The exceptions cover practically all crimes It would appear from the wording of the clause that members could not be arrested while attending sessions or going to and returning from them, in the case of such misdemeanors as are not breaches of the peace. In that case, a member who was guilty of bribery in a state in which bribery was not a felony would be exempt from arrest, since bribery is not a breach of peace literal interpretation has not been followed. In the case of Williamson v. the United States the Supreme Court construed the exceptions to include all indictable offenses. Thus, even a misdemeanor which is not a breach of the peace, if indictable, would appear to subject the member to arrest. It may be concluded that the criminal exemption of members of Congress is very slight. On the other hand, members would appear to be exempt from any court processes where the penalty for failure to respond would be subject to restraint of the person. Thus, a member of Congress could not be called to jury duty or compelled to serve as a witness. The justification for this exemption lies in the need to protect the legislative branch from encroachment by the other departments of government and in the fact that when an individual member is kept away from his legislative duties his constituency is temporarily deprived of effective representation in the national Congress.

More important than this is a provision in the same clause of the Constitution to the effect that members shall not be questioned in any other place for any speech or debate in either house. This exemption is subject to abuse, for a member may take advantage of the opportunity to vilify his enemies and to heap insult, falsehood, and abuse upon the heads of innocent people, without fear of punishment for slander. However, it is so important that the representatives of the people should be free to discover abuses and make them known, that restriction upon the freedom of members in debate would be an evil far beyond those that are inherent in the present plan. Moreover, while the member is exempt from punishment in the courts he is nevertheless amenable to the rules of his house. Section five of the first article of the Constitution provides that each house may punish its members for disorderly behavior, and, with the con-

currence of two-thirds, expel a member. Members have interpreted their immunity to permit the reproduction and general distribution of speeches made in Congress in which derogatory statements are made about individuals. Whether their exemption goes this far has not been finally determined.

Members of the two houses of Congress receive the same salary, which at present is \$10,000 a year. They also receive an allowance for clerk hire, larger for Senators than for Representatives, and a stationery allowance, and are provided with offices, most of which are in buildings adjacent to the main capitol building. They are not prevented from appointing members of their own families as secretaries out of the clerical allowance. The member may not draw his clerical allowance, keep the major part, and employ clerks at low salaries with the remainder, for the employee must draw his own salary. However, there is nothing to prevent a member from establishing agreements with his clerks to the effect that they will turn over part of their salaries to him. The salary of a member of Congress is inadequate in the case of those who are active upon important committees or who need funds for research work upon legislation. Some such members spend much more than they receive in the way of pay and allowances. The member who is willing to vote with the crowd and does not take his duties too seriously may find his place in Congress the best financial position he has known, especially when his position is sufficiently secure that he does not need to spend too much in campaigns for nomination and election.

Members are aided in their investigations by the legislative reference division in the Library of Congress, which maintains a reference service upon the progress of legislation throughout the country, furnishes information upon publications and articles dealing with legislation, and makes reports upon specific subjects.

Investigations

Each of the houses of Congress has the power to punish persons for contempt. A member himself may be in contempt of his house if he commits an assault upon a member because of

words spoken in debate. Outsiders may also be in contempt of a house, as by attempting to bribe members or publishing defamatory articles about a house. The most interesting cases of contempt have appeared when persons have refused to testify before committees of Congress. A house may give to a committee the power to call witnesses before it and to require their testimony. Refusal to testify constitutes a contempt. The power to compel testimony is not without limits, however, for it may be exercised only in carrying out the powers entrusted by the Constitution to that house. Thus, a house of Congress that does not have in view legislation upon the matter under investigation, may not compel witnesses to testify concerning transactions that are purely subjects for judicial investigation (Kilbourn v. Thompson).

The house concerned may punish for the contempt, but in such case it appears that its powers do not extend beyond imprisonment for the term of that Congress, since the jurisdiction of the house ends with the close of that Congress (Anderson v. Dunn). However, refusal to testify may not only be proceeded against as a contempt by the house concerned, but it may be made a misdemeanor, punishable in the courts. Congress has made it a misdemeanor punishable by a fine of not more than \$1,000 or imprisonment for not more than twelve months to refuse to answer or to produce papers before either house, largely because it was felt that since the power of a house does not extend beyond the end of that Congress, it was desirable to provide a punishment for such refusals that would not be limited to the end of a Congress. Moreover the fact that a house has inflicted punishment through contempt proceedings does not preclude punishment for the same action as a misdemeanor under the statute (Jurney v. MacCracken).

The power to investigate and to compel testimony is one of the most important powers of a legislative body, for often it is only by this means that abuses, correctible by legislation or punishable by impeachment, can be disclosed. Unfortunately, in recent years there has been some tendency for committees to abuse the power, appearing to browbeat witnesses and to proceed in an arbitrary way, whereas the appropriate procedure in dealing with witnesses, while it need not follow all the forms of a court, should afford the substance of fairness and reasonable consideration of the rights of witnesses.

REFERENCES

References and cases for Chapters V, VI, and VII will be found on p. 132.

CHAPTER VI

The House of Representatives

Of the two branches of Congress, the House of Representatives, with its larger numbers, presents the more difficult problem from the point of view of organization.

The Chamber

It meets in the southern wing of the capitol building in a large, rather bare-looking, rectangular room, with its longer walls running east and west. The members sit in semicircular rows. In front is the Speaker, whose desk is on a raised dais at the middle of the southern wall. In front of him on lower tiers of the dais are the desks of various clerks and officers. The boys who act as pages may often be seen sitting on the steps leading up to the Speaker's desk. Formerly the members were given individual chairs and desks at which they did much of their newspaper reading and routine work, but with the increased size of the house this has become impracticable and benches are now provided, except for two large desks on opposite sides of the center aisle, which are used by the floor leaders of the two major parties and by the majority and minority leaders from the committees as the committee bills come up for consideration. The new arrangement is conducive to greater quiet, for there is not so much rattling of papers and calling across to neighbors as before. Also it affords an opportunity for members to group themselves near the front where the discussions are being held. In so vast a room it is difficult for even the most powerful of orators to make himself heard.

When the members were provided with desks the Republicans were assigned to places on the Speaker's left and the Democrats on the right. The two parties still place themselves in this way.

In most European legislative bodies, where the seating is in similar concentric semicircles and where there are many political parties, it is customary for the most radical members to sit on the extreme left of the presiding officer, gradually shading off from liberalism through conservatism to the reactionaries on the extreme right. An exception is the British arrangement where a much smaller room is used with the members on tiers of benches lengthwise of the room and facing the center aisle. The Speaker is at the end of this room, with the supporters of the party in power on his right, faced by their opponents on the opposite side. The ministers sit close to the Speaker at his right, on the "Treasury Bench." The small size of the room and its greater decorum are conducive to real deliberation.

Along the walls of the House of Representatives hall run galleries for visitors, while outside the hall are cloakrooms and lounging rooms. The members are cared for in other parts of the building with a dining room and even a barber shop. Offices are provided in nearby buildings erected for the purpose.

Size

The Constitution provides that the membership of the House of Representatives shall be based upon population, upon a ratio of not more than one Representative for each 30,000 of population, but each state must have at least one Representative. It provides for a new apportionment after each decennial census.

Although the number of persons represented by each member of Congress was repeatedly raised, the size of the House increased from the original 65, set for the first Congress by the Constitution, to 435, after the census of 1910. After only one census, that of 1840, has the House of Representatives lost in membership. After all others up to 1920 it has gained.

The growth has been due to several factors. In the first place some states have grown faster than others, so that if the number of Representatives had been kept constant, the states of large growth would have gained Representatives while those of small growth would have lost Representatives. State pride and the personal ambition of members who would have lost seats dictated

that the membership of no state should be decreased if it could be avoided. The result has been a large increase in the membership of the body, while the necessity of fixing a ratio that would deprive as few states as possible of seats while caring for the increases in population in other states has led to departures from the round numbers that were used in early apportionments. The addition of new states to the Union has contributed further to growth in the House.

Another factor has been the problem of fractions of the population fixed in the ratio. Washington vetoed a bill that gave an additional Representative to a state for a major fraction, that is, a fraction larger than half, on the ground of unconstitutionality. In the apportionment upon the census of 1840 the idea of major fractions was accepted, however, and this accounts for the loss in membership accomplished upon that census.

After the census of 1920, no reapportionment was made. The reason given for this was the fact that the 1920 census was made when there was a temporary shift of population to the industrial states resulting from the World War. The states that failed to secure the added Representatives by this failure to reapportion protested strongly against what they considered an injustice.

In anticipation of the census of 1930, it was realized that something must be done. Reapportionment could not be delayed indefinitely. Accordingly, in 1929 it was provided by law that thereafter the President, after a decennial census, should present to Congress at its next session a statement of the number of Representatives to which each state would be entitled, with a fixed total number of 435 Representatives, distributed according to the method used at the preceding apportionment. The method used upon the 1910 census was the plan known as "maior fractions," the details of which are of interest to mathematicians but cannot be appreciated by laymen. If Congress should not provide otherwise, this plan was to be applied automatically. Congress did not provide otherwise and so the "major fractions" plan went into effect. The provisions of this act will apply to apportionments in the future, and it may be hoped that disputes over apportionment will be less likely to occur and that the present number of Representatives will at least not be increased.

The District System

The Constitution does not say whether Representatives are to be chosen "at large" or by districts. If elected "at large" all candidates for Representative from a state would be voted upon by all the voters of the state. Generally each voter would be given as many votes as there were seats to be filled, which votes he must cast for different men. The candidates with the largest number of votes would be elected. If chosen by districts the state would be divided into districts, each district electing one Representative. Whether the one or the other method is followed makes a considerable difference in the results, for where the election is "at large" all the representatives from a state are likely to be of one political party. In election by districts it is possible that the party that is in a minority for the state as a whole will nevertheless have a majority in certain districts and will carry those districts. The majority party in a state naturally will prefer election at large, and the pressure therefore up to 1842 was toward that method of choice, although both methods were used. Obviously it was unfair for some states to use one method and some another, for if states controlled by one political party should choose at large and states controlled by the other, party should use districts, the second party would be at a disadvantage.

As a result, Congress in the exercise of its Constitutional authority to "make or alter" the regulations upon the times, places, and manner of holding Congressional elections (Article I, Section 4) provided by law in 1842 that members should be chosen by districts. The act of 1911 called for choice by districts "composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants." However, it was provided that when a state was given an additional Representative, in a new apportionment, he might be chosen by the state at large until the state was redistricted. Moreover, if the representation of a state should be reduced it might abandon the district system temporarily until a redistricting could be effected. Congress never went so far as to lay out the districts itself but left this to the state legislatures.

Even these provisions, however, were not completely successful in preventing the party that controlled the state legislature from securing more seats in Congress than its numbers warranted. In the first place, the phrase "as nearly as practicable an equal number of inhabitants" left much to the discretion of the legislature. It was impossible of course to make the districts exactly equal in population and so the majority party in the legislature would lay out large districts in the areas controlled by the minority party, while laying out small districts in the areas controlled by the majority party. As each district sent one representative, the majority party was overrepresented.

In the second place, the phrase "contiguous and compact territory" constituted only a most general restriction upon the legislature that was doing the redistricting. The party in control of the state legislature so arranged the boundaries that the districts in which its opponents were in the majority would be as nearly unanimous as possible for its opponents, while in districts which it expected to carry the majorities were sufficient only to provide a safe margin. As only a majority (or, with more than two candidates, a "plurality") is necessary to carry a district, the minority party wasted votes. If some of its surplus votes could have been transferred to other districts there might have been sufficient votes to carry those districts, too. The party that controlled the legislature often carved out districts of weird shapes in effecting its purpose.

In the apportionment act of 1929, the provisions for singlemember districts were omitted, and in Wood v. Broom, it was held that Congress thereby intended to remove the requirement of the district system. Of course, the requirements concerning the number of inhabitants and compact and contiguous territory also went out. The district system is now so established that it is not likely in fact to be abandoned, but the states are now able to proceed with their redistricting without the embarrassment of the federal restrictions.

The process of arranging districts in such a way as to aid the party in control of the legislature is known as "gerrymandering," a term that probably comes from a bit of redistricting in Massachusetts in which it was alleged that Elbridge Gerry was con-

cerned. In sum, the technique of the gerrymander is for the party that controls the legislature to make its opponents' districts large in population and its own small, and to so arrange the districts that its opponents waste votes. The term "gerrymander" is also applied to any other rearrangement of boundaries for political purposes.

Gerrymandering is more prevalent in the states of the East and South where the counties are irregular in shape than in the West where they have straight lines for boundaries. However, even in the East and South public opinion is likely to condemn the process when it goes to extremes.

The courts are reluctant to interfere with redistricting acts of the legislatures and the most effective means of preventing gerrymandering lies in public opinion.

A criticism of the district system is that even without the gerrymander it gives representation to the minority only in a very imperfect way, since, as just explained, it is affected by the geographical distribution of the parties. A number of plans designed to improve upon it have been worked out in the states. They are discussed in connection with the state legislatures.

Term

The term of a member of the House of Representatives is two years. Originally considered too long a term, the criticism has veered to the other direction. The increasing complexity of modern problems makes it desirable that a body should have a reasonable time to formulate a program. Many persons now consider two years too short a time for this purpose. The Twentieth Amendment, which brings Congress together soon after the members have been elected, will help in this respect.

The term of a member can be terminated by resignation or by expulsion. The latter requires a two-thirds vote. In the impeachment case of Senator Blount, the Senate by a vote of fourteen to eleven held that a Senator was not a civil officer of the United States within the meaning of the Constitution, and that, therefore, he was not liable to impeachment. If this decision

¹ See p 304.

holds, Senators and, presumably, Representatives, are not subject to removal by the process of impeachment.

The Electron of Members

The qualifications of the voters who choose members of Congress are not under the control of Congress. They are determined by each state, with the restriction that they shall be the same as those of the electors who choose the members of the most numerous branch of the state legislature (Article I, Section 2), and that no one may be deprived of the vote because of race, color, previous condition of servitude (Amendment XV), or sex (Amendment XIX). Congress may alter the "Times, Places and Manner of holding Elections" as fixed by the state legislatures (Article I, Section 4), and, as noted above, Congress has exercised this power to the extent of fixing the time of elections and, before 1929, requiring that the Representatives be chosen by the district system. It has also required that elections be by secret ballot. It would appear, however, that Congress may not go back of the election and regulate nominations.

In the case of Newberry v. United States, Truman H. Newberry and others were charged with having conspired to violate an act of Congress limiting the amount of money to be expended in procuring nomination and election to Congress. The members of the Supreme Court were divided in their views on this. The Court held that the power of Congress to make or alter the regulations upon the times, places, and manner of holding "elections" did not carry power to regulate primaries or conventions for designating candidates. However, four justices argued that Congress did have power to regulate the nominating process, and one justice, while holding invalid the act, which was passed before the adoption of the Seventeenth Amendment, reserved judgment whether it would have been valid if passed subsequent to that amendment.

In the case of Nixon v. Herndon, coming from Texas, however, an attempt of that state to exclude Negroes from Democratic primaries was held unconstitutional, as a denial of equal

² See pp 73, 83

protection of the law under the Fourteenth Amendment. Then the legislature provided that the state executive committee of a political party might prescribe the qualifications for voting in its primaries, and the state executive committee of the Democratic party adopted a rule that excluded all other than white persons. In Nixon v. Condon this statute also was held invalid as denying equal protection. Subsequently, however, when the state Democratic convention of Texas excluded Negroes from its primaries in the absence of any state law upon the subject, the Supreme Court in Grovey v. Townsend was unanimous in holding that the federal Constitution was not involved. While the state could not be involved in excluding Negroes from primaries, the party as a private organization could do so.

As the law now appears to stand, Congress has no jurisdiction over the nominating processes for national offices. However, if a state passes a discriminatory law upon the subject or grants authority to make discriminations to any body, such statute is held to be invalid as a denial of equal protection. Congress cannot legislate upon the subject at all States may do so, provided their laws are not discriminatory or do not authorize discrimination. Party organizations may make such discriminations, however, on their own account.

The Fourteenth Amendment provides that whenever a state, except for participation in rebellion or other crime, denies the suffrage to any male inhabitants, twenty-one years of age, who are United States citizens, the basis of representation of that state shall be proportionately reduced. This provision has never been enforced. The Northern states have hesitated to revive the Negro question despite the fact that the Southern states have applied effective means to deprive Negroes of the suffrage. Moreover, the number of persons who are rejected by the officials may be only a small part of the total number of persons who do not attempt to vote since they know that they would be rejected. The number rejected, therefore, is no true indication of the persons really deprived of the suffrage.

Another objection to enforcement of this provision of the Fourteenth Amendment lies in the fact that some Northern states

³ See p 466

have suffrage requirements such as educational tests, fairly applied. If the amendment were enforced, these Northern states would lose Representatives Furthermore, there are many states in which the vote in the election is light because one of the parties is in such preponderance that the minority candidates have no chance, in normal times, to be elected. The vote in the primary of the majority party in such states will be heavy, since the primary, in effect, chooses the representative. Obviously, it would be unfair to cut down the representation of such states by assuming that those who failed to vote in the final election had been excluded. For these reasons, this part of the Fourteenth Amendment has not been enforced.

The First Meeting of a House

Every two years when a new House of Representatives meets it is a completely new body independent of the preceding House. It has no organization, no officers, no rules. The members-elect gather in the hall of the House of Representatives. By a rule of the House the clerk of the preceding House presides, but observance of this rule is based only on custom, for the rules of one House cannot bind a succeeding House. Moreover, since the House has not yet adopted its rules, the Clerk as presiding officer is governed only by the general rules of parliamentary law.

A roll of the members-elect, based upon the credentials, sent in by the governors of the states, has been prepared previously by the Clerk. He calls this roll and if a quorum is present the House proceeds to elect a Speaker. The Speaker-elect then usually is escorted to the chair by a committee that includes the defeated candidates for the Speakership. After the Speaker-elect has replied to a speech of presentation, the oath is administered to him by the member-elect present who has served longest continuously. The Speaker then administers the oath to the members-elect. In the past the oath usually was administered to the members-elect in groups by states, but in the Seventy-first, Seventy-second, and Seventy-third Congresses the oath has been administered to the whole body at once.

Where it is questioned that the claimant to a seat has the proper credentials, that is, papers certifying to his election, or if it is alleged that he lacks the Constitutional qualifications, such as age, he may be required to wait for a decision by the House before he takes the oath. Usually, the members-elect are sworn in on the basis of their prima-facie claim as evidenced by their credentials, and their final right to a seat left for later determination. This is decided by a majority vote. If, after a member has been sworn in, it is later discovered that he does not possess the Constitutional qualifications, he may be unseated by a majority vote.

Disputed election cases are referred to one of the committees on elections which reports its decision to the House for determination. Contests in the past were frequently decided upon partisan grounds but a tendency toward impartiality has been observed lately, and contests now appear to be decided more upon their merits. In England, election contests are decided in the courts, but our Constitution says that each house shall be the judge of the elections, returns, and qualifications of its members and the houses have not been willing to leave the matter to the courts. Probably they could not surrender the final authority to pass upon election cases, but judicial bodies might be set up to gather evidence and render decisions that would be formally ratified in the houses.

Qualifications of Members

The Constitution provides that a member shall be twenty-five years of age, seven years a citizen of the United States, and an "inhabitant" of the state from which he was chosen. If the House does not choose to enforce these provisions, nothing can be done about it. Henry Clay served in the Senate when he was under the minimum age fixed for that body. There is a story to the effect that when that erratic genius who signed his name John Randolph of Roanoke was once questioned by the Clerk as to his age, he answered, "Ask my constituents," although in fact Randolph was over the required age.

A constituency seldom goes outside its own district to choose a

member. It has been done in large cities containing more than one district, but it is so unusual that the requirement of residence within the district represented may almost be regarded as an additional qualification, imposed by custom. It is different from the practice in European countries, which permits the member to be chosen from any district. There, the services of an able man who cannot carry his home district are not necessarily lost to the country. Our custom deprives the country as a whole of the services of any man, however able or experienced, who cannot command a majority in his home district. This, however, is not the chief loss. Our practice is based on the theory that a member should represent the special interests of his district rather than the general good of the whole country. It results in the type of legislation that comes from the logrolling tactics of members who sacrifice the country for the special desires of their particular districts. It transforms the Representative into a special agent for the voters of his district, who look to him to provide them with federal jobs and who expect him to secure for them a part of whatever there may be to distribute in Washing-

The House of Representatives has in effect added other qualifications at times. After the Civil War and before the enactment of the Fourteenth Amendment, members who could not take the test oath of loyalty were excluded under the act of July 2, 1862. The application of this act was upheld in the House. Thus the Constitutional qualifications were added to by the combined efforts of a law and the confirmatory action of the House. In another instance, a Representative-elect from Utah, charged with having practiced polygamy in violation of law, was excluded by the House. The position taken by the House was that the Representative-elect could be excluded by majority vote, just as he might be excluded by such vote if he lacked the Constitutional qualifications of a member.

Until recently the Senate apparently had taken the position that a member with the Constitutional qualifications must be accepted, or if rejected, that the action must be by a two-thirds vote, as is required by the Constitution in the case of expulsion. In a recent case, however, the Senate refused to seat a man be-

cause of alleged irregularities in his election. Even though this practice may be a violation of the Constitution in that it adds to the Constitutional qualifications of members, there is no appeal from the decision. The practice has its elements of danger, for it may be abused by an unscrupulous or partisan majority. In view of the Newberry decision, however, it seems to be the most convenient and perhaps the only way in which a house can prevent undesirable persons from being sent to it from states that are not willing by law to provide proper regulations of their own. Whether expulsion is a proper method of dealing with offenses committed before election, or between the election and the taking of the oath, is a debatable question.

The Completion of Organization

After the swearing-in of members the next business in order is the election of the remaining officers of the House. This is done by a resolution which includes the whole slate of candidates for the various offices as previously drawn up by the majority caucus. After the House has been thus "organized," the Senate and the President are notified of the fact.

The Adoption of Rules

The next business in order is the adoption of rules. Until that has been done the House is guided by general parliamentary law, although this general parliamentary law is interpreted by Speakers in the light of the usual rules of the House. If any members want to reform the old rules of the House, they should see that the changes are made before the new rules are adopted, for after their adoption it is almost impossible to bring about a change except with the consent of the majority members of the Committee on Rules, to which proposed changes are, according to the rules, referred. The members of this committee are always members of the group of leaders of the House and can usually be depended upon to oppose the democratization of procedure. The House always adopts the rules of the preceding House, making such modifications as it may desire.

⁴ Sce p 86.

The Speaker

The most important officer of the House is the Speaker. Custom has decreed that he be a member of the House although there is nothing to prevent that body from choosing an outsider as it now does in the case of all the other officers.

The office of Speaker here has followed a different line of development from that of the Speaker of the British House of Commons. The latter, upon accepting the office, leaves his politics behind him. He does not campaign for reelection but his constituency continues to return him to the House, and no one would think of offering himself against "Mr. Speaker." The Commons retain him as Speaker until he is ready to retire. He is an officer of great dignity, is surrounded by considerable ceremony, and is provided with residential quarters in the palace of Westminster. A peerage and a pension usually are given him when he retires.

On the other hand, our Speaker is one of the leaders of his party. He frankly accepts his position as a party leader and in cases of doubt his decisions are likely to be affected by considerations of party success.

The Speaker Before the Fall of "Cannonism"

Until his powers were curtailed, a process that began in 1909, while Joseph G. Cannon was Speaker, no one except the President possessed so much power as the Speaker. He appointed the members of all the House committees, and by skillful use of this power could do much to affect legislation, placing on important committees those members who supported the dominant leaders, and punishing members who did not fall into line by putting them on committees of little influence. It is not to be understood that this power was absolutely arbitrary. Custom was a restraining influence. One state or section of the country could not be given all the places on a committee, rules of seniority could not be ignored with impunity, and of course the minority party must have its proportion on each committee; but the Speaker had much latitude, especially in promotion from one committee to another.

Another important power of the Speaker lay in his relation to the Committee on Rules, the committee that does more than any other to control the fate of legislation. This committee consisted of two members of the minority party who were ignored by the others in all matters of policy, and three members of the majority party. Of the three majority members, one was the Speaker himself and the other two were his appointees.

He also exercised much influence through his right of "recognition." Theoretically, the member who first rises to his feet has the right to speak. But in so large and distinguished a body, the supply of eloquence is likely to be far in excess of the available time, and there must be some authority to distribute the time. Custom plays a part in this, as in other matters, and certain persons are entitled to preference. However, considerable discretion must remain with the Speaker. Mr. Cannon came under criticism for his insistence that members should make their intentions known before he would grant recognition. "For what purpose does the gentleman rise?" the Speaker would ask, and recognition would be withheld if the subject that the member had in mind was not in order. The position of the Speaker was taken in the interest of orderly procedure but it was irksome to members.

A phase of the power of recognition which brought Mr. Cannon into conflict with the membership was in relation to small bills. These bills were dear to members of Congress, for they were personal bills in which individual constituents or groups of constituents were interested. They were not sufficiently important to be brought up by special order and would receive consideration only if unanimous consent were granted. In such cases the Speaker would not grant recognition unless he had been consulted in advance and had approved each bill. Since, as a member, he could have blocked unanimous consent by objecting, he exercised this power as Speaker by refusing recognition to bring up the bill. In practice, his office was crowded with Congressmen seeking approval of small bills and the right to call them up.

The justification offered for this power on the part of Speakers was that authority and responsibility for the work of Congress should be lodged somewhere and that the Speaker was the proper person to wield the power. If the House was dissatisfied, it should choose a new Speaker. The opposition, however, did not desire a mere change of Speakers. "Has it come to pass," asked Representative Shackleford, "that the Speaker of the House of Representatives has brought us to the level of the Russian peasants who have no privilege but that of revolution?"

The Changes of 1909-11

In 1909-1910, a combination of Democrats and "insurgent" Republicans, after a memorable struggle with Speaker Cannon and the "old guard," succeeded in taking from the Speaker much of his power, and the process was carried further by the Democrats in 1911. It was provided that standing committees, formerly appointed by the Speaker, should be elected by the House. The Speaker retained the power to appoint select and conference committees, but the select or special committees are not of great importance, and membership upon conference committees is controlled by custom. The Speaker was removed from the Rules Committee, the membership was increased to ten, and this committee along with the other standing committees became elective. Two more members have subsequently been added to the Rules Committee, bringing the total to twelve.

The Speaker's power of recognition was restricted, especially by the creation of a Consent Calendar, upon which members might place bills which would be considered in order on certain days if not objected to; by the institution of Calendar Wednesday when committee chairmen may call up bills for discussion; and by inserting in the rules a provision that made the Private Calendar in order on Fridays. This permission concerning the Private Calendar simply regularized what had previously been accomplished through special orders. Further changes in procedure upon the Private Calendar have been made subsequently.

The Speaker Today

The Speaker is still an important official. He appoints select and conference committees. He has powers of recognition which

⁵ See p 107.

he exercises in accordance with custom and in conjunction with the majority and minority floor leaders. On certain days (the first and third Monday of each month and the last six days in each session) that are set aside for suspension of the rules so that bills may be passed, he may, and sometimes does, refuse recognition to members who desire to suspend the rules and pass a bill to which he is opposed. He may refuse to recognize a motion for unanimous consent. This power does not, of course, apply to bills on the Consent Calendar, but it does apply to other unanimous consent requests, such as requests to limit debate on bills and requests to extend remarks in the Congressional Record.

According to the rules, the Speaker is not required to vote except where his vote would be decisive or where the House is voting by ballot. A decisive vote is different from a mere vote in case of a tie. Where there is a tie the motion that is being voted upon is lost. A deciding vote not only gives the Speaker power, if there is a tie, to vote in the affirmative and thus pass the motion, but gives him power, if there is a majority of one for the motion, to vote in the negative and bring about a tie, thus defeating the motion. It also permits the Speaker to vote when needed to provide a two-thirds majority. However, he may, if he desires, vote at any time, for otherwise his constituency would be deprived of full representation. Henry Clay, one of our greatest Speakers, once even had his name called first so that his vote would influence his followers.

The Speaker retains the important power of passing upon questions of parliamentary law. Different from the rule in the British House of Commons, his decision is not final, but it is seldom that an appeal to the House for a reversal of his decision is sustained.

He possesses two important prerogatives which are designed to prevent "filibustering" and dilatory practices by a minority. They were first exercised by Speaker Thomas B. Reed and are known as the "Reed rules." Under the first of these he can count in a quorum all members who are actually present whether they answer "present" or not. The minority party had been raising the question of a quorum and then refusing to answer when the roll was called. Reed broke up this practice by count-

ing all those who were physically present. The second rule gives to the Speaker the power to refuse to put motions that are obviously dilatory. When Speaker Reed first exercised these prerogatives, the opposition was bitter, but Reed remained firm. He was known as the "Iron Czar." However, the powers claimed by him were so necessary that eventually they were incorporated in the rules of the House.

The Speaker has the power to maintain order. Officially he represents the House as a whole, and Speakers have been careful not to compromise its dignity. He signs acts and joint resolutions, and performs numerous other duties. But the most important source of power in the Speaker lies in his status as leader of his party in the House. His influence is increased in proportion to his ability, experience, and capacity for leadership.

The Standing Committees

Except with unanimous consent all bills and resolutions are referred to a committee before any action is taken in the House. A bill has practically no chance of passing unless it is reported favorably by a committee. There are now nearly fifty standing committees in the House, and before 1927 the number was even greater. Even after committees become useless they are likely to be retained for the clerkships and stationery allowances they carry, and the prestige among his constituents that comes to the member whose stationery proclaims him chairman of a committee. Committees vary in size from two or three on an unimportant committee, to nearly forty on the Committee on Appropriations. Committees are always bipartisan and the majority party in the House sees to it that it has a safe majority on each committee. An exception is the Committee on the Disposition of Executive Papers which now consists of one Democrat and one Republican. However, committees are not divided between the two parties in proportion to their strength in the House. At present the Republicans constitute only a small minority in the House but nevertheless have a substantial minority on each committee. Each Republican has more committee assignments on the whole than each Democrat. The minority party is represented on committees not in proportion to its strength, but by

virtue of the fact that the minority must have a certain representation on each committee. A member does not often serve on more than four committees at one time and usually serves on less than that number Some important committees are exclusive, that is, a member assigned to one of them is not normally assigned to another. However, in the Seventy-fifth Congress, with only a small group of Republicans in the House, exceptions were made to this principle in its application to the Republicans.

Among the most important committees of the House are Rules, Ways and Means (which draws up the money-raising bills), Appropriations (which draws up the bills that appropriate the money for expenditure), Banking and Currency, Judiciary, Agriculture, Interstate and Foreign Commerce, Military Affairs, and Naval Affairs. Other committees that at times have acquired importance, frequently because of the political influence they may have brought, or worse, their "pork barrel" aspects, are Invalid Pensions (Civil War Pensions), Pensions (Pensions for wars other than the Civil War), Rivers and Harbors, and World War Veterans' Legislation. From time to time various individual committees will rise in importance as the subjects over which they have jurisdiction come to the front as matters of national concern.

According to the rules, standing committees are elected by the House. In practice, this is merely the formal ratification of a decision already reached. The majority party determines the number of members from each party that will be placed on each committee. It is left to each party to determine what persons shall constitute its quota on the committees. The caucus or conference chooses a committee on committees which makes up the list of that party for each committee. The list is presented to the House in the form of a motion or resolution, and is passed as a matter of course. The committees on committees of the caucuses, although unknown to the rules, wield the appointing power that the Speaker lost in 1911. In selecting committees they are guided by the same principles concerning seniority, geographical distribution, and the like, that had guided the Speaker, and in practice their decision is, in effect, just as final.

⁶ See pp 114, 115.

The chairmen of committees are elected by the House. In practice, through the operation of the seniority principle, the House chooses that member of the majority party on the committee who has had the longest continuous service upon it. The chairman of a committee enjoys an exceptional status, not only because of his advantage in experience, but through the prerogatives of the office. On Calendar Wednesday it is usually the chairman of a committee who is authorized to call up bills for discussion. He may even at times exercise a negative upon the decision of the whole committee. For instance, when the Committee on Rules has adopted a special rule calling up a certain bill, the chairman has been known to defeat the rule simply by not reporting it for a vote in the House.

Committee meetings usually take place in the morning, for the House meets at noon and no committee except the Committee on Rules may meet while the House is in session without permission of the House.

Various committees rise to great importance at different times. As problems of agriculture, railroad regulation, water power, and the like come into prominence the committees having charge of those subjects have the interest of the country centered upon them. There are three committees, however, that stand out from the rest as always important. Two of these are the committees having to do with the raising and spending of money. State legislatures may deal directly with even more vital and varied matters of real legislation than does the Congress of the United States, but Congress stands out in this country and in the world for the immensity of the sums which it raises and spends. Moreover, the methods used in the raising of these sums may be such as to determine the fate of whole industries, and the method of expenditure is of interest to many groups and localities as well as to the country as a whole. The third of these committees is the Committee on Rules.

Financial Bills

The Committee on Ways and Means deals with the raising of money. Its practice is to divide the great revenue measures into parts, giving each to a subcommittee. After hearings have been

granted by its subcommittees to interested persons, it proposes the rates to be imposed upon articles brought into this country from abroad, proposes income tax rates and excise duties, and makes such other proposals for the raising of money as it may consider advisable. These proposals are incorporated into a bill. The members of the minority party on this committee are ignored by the majority party as a rule, since revenue bills are considered party measures. A revenue bill, as a party measure, is almost certain to be passed with few changes.

The Committee on Appropriations deals with the spending of this money. For a long while before the adoption of the existing budget system, many committees in addition to the Committee on Appropriations could report appropriations, with the result that it was impossible to adjust income and expenditures so as to bring about a "balanced budget." At present these committees, except the Committee on Claims, may only bring in a bill "authorizing" an expenditure. The Committee on Appropriations may later report a bill actually making the appropriation. With the appropriations it is possible for it to cooperate with the Committee on Appropriations it is possible for it to cooperate with the Committee on Ways and Means, adjusting expenditures from year to year in such a way as to balance with income.

Under the budget system now in force, these committees have before them the recommendations of the administration both as to income and expenditures. In England, such recommendations would be passed practically without change, for by an ancient self-denying rule the House of Commons will not proceed upon any expenditure except upon the recommendation of the Crown, and this is so construed as to prevent increases in the recommendations of the Crown. The idea of cabinet responsibility precludes the making of any substantial changes even in the nature of reductions in the appropriations, so long as the cabinet has the support of the House. The same principle applies to revenue-raising bills. The House of Lords has only a suspensory veto of one month upon money bills. It is possible for the legislature in a cabinet-governed country to follow this procedure, for the cabinet is really the choice of the dominant house and can be forced out of office by it, but in this country, with an executive independent of Congress, the control of that branch is exercised through its legislation. As a result, Congress makes many changes in the budget proposals of the administration.

There has been much criticism of so-called "pork-barrel" legislation by Congress. This was especially true before the advent of the budget system. The term "pork barrel" refers to the money that is appropriated for local projects in the states. Probably it is derived from the custom on old southern plantations of opening a barrel of meat at periods for distribution to the slaves. Such legislation is supposed to result from the process known as "logrolling," by which members vote for local projects in other constituencies in return for votes for appropriations in their own districts. Probably the actual trading of votes for such purposes is small, but in effect when a member votes for or fails to vote against undesirable local bills of other Congressmen rather than incur their enmity and opposition to his own local bills, he is engaging in "logrolling." The Rivers and Harbors bills especially have been subject to criticism, and it has been alleged that millions were appropriated for useless projects. On the other hand, it is answered that the Rivers and Harbors Committee never acts upon a project until it has been approved by the army engineers.

At the present time the Committee on Appropriations divides itself into subcommittees which meet weeks in advance of the opening of Congress, hold hearings, and have the work well under way before the session begins. The decisions of these subcommittees are nearly final so far as the House of Representatives is concerned, for neither the committee itself nor the House is likely to adopt important changes. Much the same procedure is followed by the Committee on Ways and Means. Both of these committees are "exclusive" committees, that is, the members do not serve on any other committee.

In connection with this matter of financial legislation, an interesting practice has grown up in the House whereby certain members are left the unpleasant and laborious task, which they undertake voluntarily or at the request of party leaders, of scrutinizing carefully the smaller bills to prevent the introduction of "jokers" and undesirable expenditure. When a bill involves ex-

penditures and is not approved by the Budget Bureau as in accord with the budget plans of the administration, these members are likely to "object" when the attempt is made to put it through the House on the Consent Calendar. Their objection is almost certain to prevent the passage of the bill. The Private Calendar also is left largely to the scrutiny of a few members who undertake the task of opposing undesirable private bills. Before the fall of "Cannonism" the Speaker had acted as watchdog of the Treasury, and the present system has grown up to replace his work in this respect.

It was formerly the practice to attach to appropriation bills matters of legislation that might be vetoed by the President if such legislation were in a separate bill. It constituted a "rider" on the appropriation bill. Under present rules, legislation may not be added to an appropriation bill unless the effect of such legislation is to reduce expenses. At times "riders" are still attached to appropriation bills and are passed, despite the rule, but this can occur only when no single member calls attention to the "rider" and objects to its inclusion in the bill.

The Committee on Rules

A third committee of great importance is the Committee on Rules. This committee now consists of twelve experienced members of the House, and it is this committee, or rather the eight members thereof who are of the majority party, that more than any other, decides the fate of legislation, for it is the Committee on Rules that reports special rules to bring important bills before the House for consideration.⁸

The Committee of the Whole

An institution with an interesting history is the committee of the whole. Its origin is to be found in the British committees of the whole house. In the British Parliament it had been customary to send important bills to large committees, but when attendance began to drop off, all members were invited to attend

⁷ See p 108.

⁸ See p 106.

so that these bills might be discussed by a sufficiently large group. Another supposed advantage of committees of the whole came from the fact that the Speaker formerly was looked upon as the king's representative. Since the king was a power much to be feared, frequently it was desired to discuss matters in the absence of the Speaker. Therefore, the house would go into committee of the whole. Since the Speaker did not preside over committees they could speak their minds freely. Decisions reached in committee of the whole were later adopted by the house in formal session.

Whatever influences may have played a part in its development in Great Britain this ancient institution has survived in our House of Representatives. In committee of the whole the Speaker does not preside, but names another member in his place. The quorum is only 100, whereas a majority is required to do business in the House proper. There are no roll calls and therefore no member's vote is recorded. The discussions, however, are reported in the Congressional Record.

The device of the committee of the whole permits informal discussion of measures by less than a majority of the whole membership. In addition to this, since no member's vote is recorded it permits him to vote his conscience upon items of a bill without fear of punishment from his constituents. The decisions reached in committee of the whole must, of course, be ratified by the House proper in order to have any legal validity.

There are two forms of the committee of the whole. One is known as the Committee of the Whole House, which may consider private bills. This form is virtually obsolete, since, as will appear later, private bills are now considered under a special procedure by which the House meets merely "as in" committee of the whole. The other is the Committee of the Whole House on the state of the Union, which considers all bills raising revenue, general appropriation bills, and other public bills which directly or indirectly appropriate money or property. It is customary to divide the debate in committee of the whole into two periods. The first period is devoted to what is known as "general debate" and, when in the Committee of the Whole House on the state of the Union, this general debate is not confined to the ments of

the bill itself, but may be devoted to anything upon which the member desires to speak. It is at this time that members have their great opportunity to make political speeches, attacking the administration or the opposing party. General debate probably has some relationship to the old custom in the House of Commons which called for a "redress of grievances" before the House would raise money for the Crown.

General debate is followed by the reading of the bill by sections or paragraphs. A member may speak for five minutes in support of an amendment to a section or paragraph and another has the same length of time in which to oppose him. Since debate is permissible only upon amendments, a member who desires to discuss a section or paragraph may make a "pro form;" amendment in order to get the floor. The customary pro forma amendment is "to strike out the last word." The member who made the motion then may discuss the section or paragraph for five minutes. Another member may reply in a five-minute speech. The pro forma amendment is then withdrawn by unanimous consent. The same motion may not be made again, although a new motion "to strike out the last two words" is permissible. The use of such pro forma amendments is not confined to the American Congress. In the British House of Commons, where items in appropriation bills cannot be increased, members sometimes move that the item be decreased, which is permissible, so that they may show why the ministry was wrong in making the item so small! The pro forma motion in such cases frequently is to reduce the item one hundred pounds.

Debate under the five-minute rule in the House of Representatives must be germane, that is, it must be confined to the matter under consideration.

It will be observed that the committee of the whole serves the purpose of giving the members an opportunity to make speeches, even though the time is limited. A short speech in committee of the whole often is followed by a request to revise and extend the remarks in the Congressional Record, so that the short speech made in committee appears as an extended oration when it is printed and distributed among the member's constituents.

Bill Drafting

It is seldom that a bill involving legislation is drawn up by the member who introduces it. Most legislation is prepared by organizations and persons who are interested in its passage. The member in fact does little more than sponsor it. Thousands of bills are introduced in each session. Many are introduced at the request of constituents with no thought that they will be passed. Most of them never emerge from the committee to which they are referred. Fewer are passed.

If a member desires aid in drawing up a bill he may be able to secure assistance from the official legislative counsel, skilled bill drafters, who are employed for the purpose of providing expert service. Normally, however, these bill drafters are, used when a bill is taken up by the committee rather than at the initial stage of introduction. Many of the bills are drawn up in the government departments. Others are drafted by the lawyers for the organizations interested in having them passed. Bill drafting calls for legal training, technical skill, knowledge of the purposes of the proposed legislation, and meticulous care. The misplacing of a comma may mean a difference of millions in an appropriation bill, and a careless bit of phraseology or the failure to provide against misinterpretation by the courts may lead to a perversion of the whole purpose of a piece of legislation.

In cabinet-governed countries, the number of bills is kept down by the fact that the cabinet initiates most of the legislation. In fact, in England so large a part of the time is absorbed in discussion of cabinet proposals that the members must draw lots for opportunities to introduce bills of their own, and even the bills that are introduced have small hope of passage. There, the ministry, with the assistance of parliamentary counsel or bill drafters, draws up carefully prepared measures which have every chance of passage so long as the ministry enjoys the "confidence" of the House of Commons.

The History of a Bill

In the House of Representatives a member introduces a bill

simply by leaving it at the clerk's desk where it is given a number. It is the common assumption in American legislatures that bills must be read three times before they are passed, but probably in no legislative body is this actually done. The House of Representatives is no exception. The first "reading," which, according to the rules is by title, is accomplished by printing the title of the bill in the Journal and the Congressional Record The bill is then sent to the appropriate committee. A private bill is referred to the committee named by the member who introduces it. The clerk, under the direction of the Speaker, determines the appropriate committee for other bills. The rules require that every bill must be referred to a committee.

The committee to which the bill is referred may do any one of four things: (1) It may report it favorably. (2) It may make an unfavorable report, although this is done only on rare occasions. (3) It may amend it, or combine its provisions with other bills, even to the extent of rewriting it altogether. Under such circumstances it is reported as an amended bill bearing the original bill number and title, for no committee has the power to combine two bills in the technical sense, that is, report a single bill bearing two numbers, nor has it the power to report a new bill under a new title. (4) It may not report the bill at all. This has the effect of killing it, with the additional advantage of doing it quietly without the possibility of a debate in the House. Even though a majority of the members of the House desire to pass the bill, they can do nothing about it if the committee does not report. It is true that there is a rule that permits the House to withdraw a bill from committee. At one time it was known as the "unworkable rule," so difficult did it make the procedure, and even now in its amended form action is not likely to be frequent. Much of the agitation for more democratic procedure in Congress has centered around proposals for a method by which it would be possible for the House to withdraw a bill from an unfavorable committee. The rule has been amended several times to make the process easier or more difficult. An easy process makes for democracy in the House, but at the same time weakens party responsibility. The struggle

has mainly centered around the number of members required in the various steps in the process of discharge. In its "unworkable" form the motion for discharge had to be seconded by a majority of those present, voting by tellers, and for passage required a majority of the total membership. Even then the bill was merely placed on its appropriate calendar and might never come up for consideration. At present the rule requires that a petition be signed by a majority of the total House membership. After a period that can never be less than seven days, the motion for discharge may be brought to a vote, an ordinary majority prevailing. If the House then decides to consider the bill from which it has just discharged the committee, it may upon an ordinary majority vote proceed to do so.

As the bills are reported from the committees they are placed in order on the proper calendar. There are three of these calendars. Upon the House Calendar are placed all public bills that do not involve the raising or expenditure of money. Upon the Calendar of the Committee of the Whole House on the state of the Union, known usually as the Union Calendar, are placed all public bills involving the raising of revenue or appropriation of money or property. Upon the Calendar of the Committee of the Whole House, known as the Private Calendar, are placed all private bills, that is, bills affecting individuals rather than the public.

The mere fact that a bill is on the calendar does not mean that it will be discussed or voted upon in the House. Unless interrupted by variations in the procedure, bills on the calendars would be taken up in order as reached, but the calendars are so crowded that there would not be time to discuss all the bills on them. A process of selection must take place. Party leaders have much to do in determining what bills are to be considered. Ordinarily, if the majority and minority floor leaders are agreed upon the consideration of any bill, the House will grant unanimous consent to call it up from the calendar at a fixed time. If, however, the minority party, or anyone else, should refuse to coöperate, the member in charge of the bill may ask for a special rule from the Committee on Rules. The Committee on Rules may then draw up a rule fixing the time for consideration

of the bill, distributing the time for speeches on each side, and otherwise limiting the debate. The rule may restrict the making of amendments and so limit debate as to give the House practically the mere power to say Yes or No on the bill. This rule needs only a majority vote for adoption.

In view of the fact that power has been so concentrated in a few hands certain other counterbalancing devices which aim at greater democracy exist permitting bills to be brought up in other ways. In general, they make it possible for bills of small or medium importance to receive consideration out of the usual order. On Wednesdays, the committees are called in order, and the chairman of each committee as it is reached may, with the consent of his committee, bring up from the calendar any bill that the committee has reported. However, Calendar Wednesday may be dispensed with by unanimous consent or by a two-thirds vote Except by two-thirds vote no committee may occupy more than one Wednesday until all other committees have been called. Even with this provision, however, committees at the bottom of the list do not often profit by Calendar Wednesday.

To prevent private bills from being pushed aside by more important business they are placed on a special calendar, as explained above, and the first and third Tuesdays of each month are set aside for that calendar. When a private bill comes up on the first Tuesday of the month, if objection is made by two members, it is sent back to its committee. If objection is not made by two members, it is considered "as in" committee of the whole (that is, by the House proper with the Speaker presiding, but under the rules of the committee of the whole to the extent that the bill is read through for amendments under the five-minute rule but without general debate) and is passed or rejected in the usual way. If a bill is sent back to committee by objections as above described, it may nevertheless be brought back on the third Tuesday of a month by the committee in an omnibus bill (that is, a single bill in which several individual bills are embodied, each with its own number and title). An omnibus bill is not subject to objection, but is considered as in committee of the whole and voted upon. The House may send some of the titles in an omnibus bill back to committee and pass the remainder if it likes. Individual bills coming up on the third Tuesday, not in omnibus bills, are subject to objection in the same way as those coming up on the first Tuesday.

The second and fourth Mondays in each month are set aside for bills from the Committee on the District of Columbia. However, it is comparatively easy under the rules for the House to proceed to other business on the second and fourth Mondays.

Another device for bringing up bills from the regular calendars is to transfer a bill to which there is little opposition from the House or Union Calendar to the Consent Calendar. The first and third Mondays are devoted to this calendar. When a bill is first reached on this calendar one "objection" to it closes the debate on that measure. It can then be placed on the calendar again and when reached a second time it requires three objections to remove it. Otherwise it proceeds to a vote. In this way many bills that have little opposition are passed when otherwise they would not be reached. To prevent undesirable legislation from being put through on this calendar, certain members are depended upon to scrutinize carefully all bills upon it. In part, the creation of these special variations for the protection of medium and small bills came about the time of the fall of "Cannonism," and in part they had been in effect before that time.

When a bill is reached on its calendar or is otherwise called up, it goes to its second reading. This reading is in full although the members already have been provided with printed copies of the bill. All bills on the Union Calendar must go for their second reading to the Committee of the Whole House on the state of the Union.

After the second reading a vote is taken upon the question of engrossment and third reading. If the bill has not been considered in committee of the whole it is at this time that debate takes place. If decided in the affirmative, the bill must, in theory, be engrossed (which now means "printed") before being read a third time. As a matter of fact the House usually assumes that the bill is engrossed and proceeds immediately to the third reading, which is usually by title. However, if some member insists upon a reading in full, the third reading may be

delayed until the bill actually has been engrossed, after which it is read in full.

After the third reading the question of final passage is put and if decided in the affirmative the member in charge of the bill moves to table the motion to reconsider the bill. The reason for the curious procedure involved in this last motion lies in the fact that a motion to reconsider the vote that passed the bill might be made on the same day or the day following. Since the motion might come at a time when the supporters of the bill were in the minority, even though the motion itself must be made by one who voted for the bill, it is best to clear the matter up while a favorable majority is still present. Only one motion to reconsider is permissible. Upon the adoption of this motion, the bill is safe. The ease and simplicity with which legislators can evade procedural safeguards shows the futility of trying to restrict them by constitutional provision. After all, some confidence must be placed in the intelligence and sense of responsibility of our representatives.

Debate C.

One of the most serious and pervasive problems in the House is the distribution of its time. Debates must be brought to a close and the dilatory practices of minorities must be curbed. According to the House rules a member may speak for only one hour on the same measure except, under some circumstances, when he is in charge of the bill for the committee. Speeches must be germane to the subject, except in general debate in the Committee of the Whole House on the state of the Union. The power of the Speaker to refuse to put obviously dilatory motions, and his power to count in a quorum all who are physically present are effective in dealing with obstreperous minorities. If some members desire to prevent action by staying away, leaving the House without a quorum, those who are present may send the Sergeant-at-Arms and his assistants out to bring them in. Where a minority is willing to cooperate, agreements can be made, with unanimous consent, to close debate upon a measure after a fixed period. Such agreements often are made by

the majority and minority floor leaders. If the minority will not agree, the Committee on Rules can report a special rule fixing the time, which can be adopted by majority vote.

Another device is known as the "previous question." If the motion for the previous question is adopted, a vote upon the main question and all pending motions is taken immediately, provided there has been any debate at all. If there has been absolutely no debate the vote is taken at the close of forty minutes. The slightest amount of debate, even in the committee of the whole, eliminates the requirement of forty minutes debate. Normally, this motion is made by the member in charge of the bill. The devices for preventing obstruction are so complete that "filibusters" are no longer a problem in the House of Representatives.

Members of the committee reporting the bill have priority in debate and normally they will be called upon first, alternating the speeches between the supporters and opponents of the bill. Often the chairman of the committee if he is favorable to the bill has charge of the time for speeches in support of the bill and allots the time, giving a few minutes each to various members. The ranking minority member may, if he opposes the bill, allot the time in opposition. Sometimes the majority and minority floor leaders allot the time, or the Speaker, after conference with the floor leaders, may have before him a list of persons who have been agreed upon, and he recognizes them in order.

Much time is lost in roll calls. To call the names of 435 members upon a roll call or a Yea and Nay vote and record the responses seems to be a waste of time. Electrical voting devices which record the whole vote in an instant could be substituted. Such a plan, however, would necessitate giving the members individual seats, and this would be inconvenient. Moreover, there is some doubt whether the House really wants to save time. Lack of time is a convenient excuse for not passing bills when political expediency would not permit a flat rejection. When the House leadership desires to have bills passed, they have no difficulty in getting a vote, and although there is not a great deal of time for debate, it must be remembered that in a House of 435 members, with a great number

and variety of matters to consider, the real legislation is in committee. It is seldom that a debate on the floor ever changes a decision or even a single vote.

The Congressional Record

The debates are recorded in the Congressional Record. This is distinct from the Journal of the House which is a mere record of bills, motions, votes and the like. The Congressional Record is supposed to be a stenographic report of what is said. As a matter of fact the members revise the copy and often make changes from what really was said. Moreover, under "leave to print" and permission to "revise and extend" their remarks, lengthy speeches appear in the Record which were not delivered at all or were delivered only in part. In excuse for this it must be remembered that it is not possible to give 435 members the time they desire for speeches, and as one Speaker suggested, it is better to print them than to be compelled to listen to them. However, members can reprint these speeches at cost and send them through the mails under the franking privilege. Constituents may believe that the speeches actually were delivered. In the past, it was not unusual to use this privilege for the reproduction of speeches and pamphlets of other persons, but recently, unanimous consent seems to be refused quite consistently when the purpose is to reproduce the work of persons other than the member who desires leave to print. The Senate, which does not make use of extensions of remarks of the Senators themselves, still permits the publication of articles by others where individual Senators desire to have them reproduced. The anxiety of members to have their speeches given publicity is in striking contrast with the secrecy with which the British Parliament in its early history guarded its debates. While visitors are now admitted to the galleries there was, until 1875, an ancient rule under which a member could rise in his place and cry "Mr. Speaker, I espy strangers," and the Speaker would have to clear the galleries. Members now are only too desirous of publicity and the debates are reported in full, as they are in the United States.

The Rules

The rules of the House of Representatives are so complicated that only the most experienced members can be familiar with them. These rules, based upon Thomas Jefferson's Manual, have been altered and refined so that today they are highly complicated. They can be understood only in the light of hundreds of precedents. These precedents were collected in the monumental work of Asher C. Hinds, *Precedents of the House of Representatives of the United States*, in five large volumes of text and three of index. Subsequently these have been brought down to date.

There is a regular order of business: r. Prayer; 2. Reading and approval of the Journal; 3. Correction of the Reference of Public Bills; 4. Disposal of business on the Speaker's table (business from the Senate, President's messages, and so forth); 5 Unfinished business; 6. The morning hour for the consideration of bills called up by committees (practically obsolete); 7. Motions to go into Committee of the Whole House on the state of the Union; 8. Orders of the day (practically obsolete).

This regular order may be interrupted by over a dozen privileged matters, however, such as money bills, Calendar Wednesday, and bills under special rules from the Committee on Rules. Not only is the business of the House thus brought up under a complication of rules, but in its consideration there are rules governing the making of motions which appear incomprehensibly complicated to the uninitiated. The motions themselves are ranked in order of precedence. For instance, while a question is under debate no motion may be received other than motions to adjourn, to lay on the table, for the previous question, to postpone to a "day certain" (that is, to a fixed day), to refer, or to amend or postpone indefinitely, and these motions have precedence in the order mentioned. Men may spend years in Congress and yet find themselves puzzled by tangles that develop in the application of these rules.

The Political Parties

Back of the formal House organization are the political par-

ties, which furnish the motivating force for House action. This does not mean that the legislation of the House is all partisan or even predominantly so. As a matter of fact, most of the bills passed by Congress are considered without regard to party lines, although where a member has no decided opinions upon a bill he is likely to follow the members of his party on the committee reporting the bill. Nevertheless, it is the parties that choose the officers, determine the make-up of committees, and become responsible for the accomplishment of the business of the House and the quality of its legislation.

Each of the two major parties makes use of the "caucus" or "conference," which is a meeting of the members of that party for the purpose of securing united action on matters before the House. The Republican meeting has no formal rules but in general follows the rules of the House itself. Since shortly after the revolt against "Cannonism," the Republicans have used a "conference," the decisions of which are not binding on the members except at the beginning of a Congress when, in the choice of officers, a majority vote of the conference is considered binding. The decisions of a "caucus" as distinguished from a "conference" are binding upon those who attend.

The Democratic caucus has a formal constitution. Its decisions upon party policy or principle are binding upon all Democratic members of the House when reached by a two-thirds vote, provided this is a majority of the whole Democratic membership, except that no member is bound upon questions involving a construction of the United States Constitution, or questions upon which he has made contrary pledges to his constituents before election or received contrary instructions from the body that nominated him. An ordinary majority is binding for the election of caucus officers or for nominating candidates for House offices. Both groups at present meet in secret.

The justification for a binding caucus which subordinates the individual's own judgment to that of his caucus lies in the necessity for party unity upon those matters for which the country will hold the party responsible. However, it is true that the secret caucus is likely to be controlled by the party leaders. Also it will be observed that a caucus bound by a majority de-

cision may lead to a control of the House by a minority, for a majority of the caucus of the majority party may well be less than half of the total membership of the House.

At times the caucus may become very powerful. Sometimes it actually shapes the details of important bills. In recent Congresses, however, the caucus has not attempted to work out such details.

Perhaps the most important work of the caucus is to put forward a candidate for the Speakership and to name the members of its party for the various standing committees. This latter function in practice is performed by a committee of each caucus. The caucus chooses the floor leader, the steering committee, and such other officers and committees as it may wish to name.

At present the Democrats in the House have a floor leader, a whip, assistant whips, a committee on committees, and a steering committee.

The floor leader is the leader of the party on the floor of the House. He must be a skilled parliamentarian, always on the alert. He should be able to control his followers, but he cannot afford to be too arbitrary, for he may become the candidate for the Speakership in the next House.

The whip aids in keeping the members of the party in line. Since the floor leader finds that much of his time is taken up in following the course of legislation, there is need for a whip to keep in touch with the attitude of the membership of the party upon important legislation, encourage the faltering, convince (perhaps with the assistance of patronage) the doubtful, and see that all are present when legislation comes up for a vote. The Democrats now have an assistant whip for each state which has a Democratic representation in the House.

The Democratic members of the Committee on Ways and Means are chosen by the caucus and they act as a committee on committees for that party, choosing the Democratic members of the other standing committees. The recommendations of the committee on committees are submitted by the floor leader to the House, which always ratifies them.

The steering committee of the Democratic party consists nor-

mally of fifteen members, each from one of the fifteen geographical districts into which the United States is divided. In the Seventy-fifth Congress it also included ex-officio the Speaker, floor leader, caucus chairman, chairman of the Rules Committee of the House, and the whip. It elects its own chairman. In this Congress there were temporarily sixteen members on the committee, one of the districts having two persons to represent it. Each member is subject to his zone rather than to the caucus. This committee does not attempt to control the business of the House or to pick out bills for consideration. Neither is it a "cabinet" for the floor leader as is the corresponding Democratic committee in the Senate. Rather it is a body that attempts to bring about harmonious action on the part of Democrats in the House when differences arise upon important legislation.

There is also a Congressional campaign committee which consists of one member from each state having a Democratic delegation. It assists the Democratic candidates in their campaigns for election to the House, and is particularly active in the "off" years when a President is not being chosen.

The Republicans have a floor leader as do the Democrats. It is customary for the minority party to choose for floor leader the defeated candidate for the Speakership. The Republicans also have a whip. They do not have assistant whips as do the Democrats. However, in each state with a Republican delegation the oldest member in point of continuous service is the "dean," and is looked to by the whip to report upon the attitude of the members of that delegation toward pending legislation. His position, therefore, is somewhat analogous to that of an assistant whip.

The committee on committees of the Republican party consists of one member from each state having a Republican delegate in Congress, each member casting as many votes as there are members in his delegation. The Republicans also have a steering committee, now consisting of the floor leader and four other members, and a policy committee of nine members. The policy committee is concerned with matters of national party

policy rather than with matters on the floor of the House. There is also a Congressional campaign committee consisting of one member from each state having a Republican delegation.

It must be remembered that party organization changes from Congress to Congress, and the powers of the various organs vary from time to time.

Democracy

The overthrow of the Speaker in 1909-1911 was followed by some democratization in the House. Members of the ten or twelve most important or "major" committees now may serve on only the one, so that a few men do not control all the important committees. The Committee on Rules is one of these committees and the temptation to favoritism by this committee toward any of the bills committees is thus reduced. Floor leaders do not now customarily serve on committees at all. Thus, there appears to be growing up a distinction between those leaders who deal with bills in general, the Speaker, the floor leader, and the members of the Rules Committee, and on the other hand, the leaders in special classes of legislation, the chairmen of important committees. Power appears to be diffused and a democratization seems to have taken place. In addition, the principle of seniority in making committee assignments appears to have been strengthened since the fall of Cannon, thus leaving less to the discretion of the committee on committees. establishment of large committees based upon states or other areas, such as the Republican committee on committees and the Democratic steering committee, are evidences of the attempt to democratize party machinery.

Democratization has not, however, been so complete as would appear from all this. The party in power will be held responsible for legislation and to meet that responsibility there must be unified control. Actually, a small group, composed of the Speaker, the majority floor leader, probably the chairman of the Committee on Rules, and possibly a few others, are likely to control. Speaker Longworth, the floor leader Mr Tilson, and the chairman of Rules, Mr. Snell, formed a powerful leadership

some years ago. Even more recently, however, the leadership seemed to have passed entirely from the House membership and lodged in President Roosevelt. This was in part due to public opinion which had turned against the House when for a number of weeks it got beyond the control of its own leaders. In this way, democracy in the House has led to an autocratic control from the outside. It could not have occurred under the great speakers of the past—Clay, Blaine, Randall, Reed, and Cannon.

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References and cases for Chapters V, VI, and VII will be found on p 132

CHAPTER VII

The Senate

A Dignified Body

While second chambers in other parts of the world have been declining in power and importance the Senate of the United States has not only withstood encroachments from the lower house but has added to its own influence and prestige. It is the most powerful second chamber in the world. Among all American political institutions, the Senate, next to the Supreme Court, has evoked the greatest admiration from European observers. Many things have contributed to this Its special powers, particularly in regard to foreign relations, the greater age and longer term of its members, its smaller size that gives a greater importance to individuals, the great men who have been included in its membership, the fact that it represents the states as political units, and the greater dignity of its proceedings, all have been factors in giving the Senate a distinction not enjoyed by the House of Representatives.

The physical surroundings of the Senate are more dignified than those of the House. The hall, in shape and arrangement similar to the House, is smaller, and members can be heard with comparative ease. The greater emphasis upon individuality in the Senate is evidenced by the individual desks which are arranged like the benches in the House, in concentric rows facing the desk of the presiding officer, the Vice-President. As does the Speaker of the House, he sits on a raised dais in the middle of one of the longer walls. The Senators conduct themselves with more decorum and the room is quiet and in keeping with its reputation as "the greatest deliberative body in the world." The old desks at which sat the Senators of the past are still in use, a snuff box is retained at the central desk near the door,

and Senators are still provided with the box of sand that in an earlier period served the purpose of blotting paper.

Qualifications

There are two Senators from each state. They must be not less than thirty years of age, citizens of nine years standing, and inhabitants of the states they represent. Their term is six years, one-third of the body being renewed every two years. The terms of the two Senators from a state are made to overlap. When a new state is admitted the terms of its first Senators are made to fit into this plan. Thus the whole Senate is never renewed at a single election. A change in public opinion may require four years to express itself in a majority of the Senate membership. Thus the Senate is a "continuing body" and never has to "organize," as the House must, every two years.

Many of the abler members of the lower house after building up a reputation there are elected to the Senate. This may mean that the average of ability in the Senate is greater through drawing the best men from the House. It may be argued, however, that such men may have survived the period of their greatest usefulness before the opportunity came to enter the upper chamber. The members have more wealth than the members of the lower house, and at one time the Senate was known as a "rich men's club," but there are men of small property in the Senate and no doubt popular election has reduced the number of representatives of great corporations who at times have been found in its membership.

Method of Choice

Until 1913, Senators were chosen by the state legislatures. This was in keeping with the idea that Senators were to represent the states as such. The plan was never entirely satisfactory. The Constitution did not determine the method by which the state legislature should proceed. For instance, it was not decided whether the two houses of the legislature should agree separately or whether they should meet together and decide by

majority vote of the joint session. Deadlocks sometimes occurred in the legislatures with the result that Senatorial seats remained vacant for years., Congress finally laid down a mode of procedure that reduced this difficulty greatly, but there were other problems. There was a great temptation to rich men and corporations to use money or other improper means to secure the votes of members of the legislature. It was believed that some Senators were merely the representatives of corporations. Another objection lay in the fact that the most important business of the legislature might be the choice of a Senator. Sometimes the members were elected because of their preference for this or that candidate for a Senatorial vacancy, and state problems were neglected in the campaign. The result was that the people were virtually choosing a United States Senator when they voted for members of the state legislature. Some states even went so far as to allow the people to express on their ballots their choice for Senator and the legislature was under obligation to carry out the will of the people thus expressed. In this way a Democratic legislature might be chosen which was expected to choose a Republican Senator. In time there came to be many Senators who were in effect chosen by the people.

In 1913, the Seventeenth Amendment was adopted providing for direct election of Senators by the people. As only one Senator is chosen at a time the election must be at large from the whole state. Whether the character of the membership has been improved is a question. Many of the greatest Senators in our history owed their election to the state legislature, and with this method of choice for decades the Senate nevertheless maintained itself high in popular estimation. It was its supposed relations with "big business" that brought the Senate under suspicion. The stage now has been transferred from the legislative halls to the polls. Probably it is more difficult to corrupt the electorate than it is to purchase the votes of a few members of the legislature. However, the use of money in primaries and elections in illegitimate ways is still open to the unscrupulous, and enormous sums can be spent in ways that are recognized as entirely proper, giving a decided advantage to wealth.



The Vice-President of the United States is the presiding officer of the Senate. The president pro tempore, chosen by the Senate, presides in the absence of the Vice-President, and when he exercises the office of President of the United States. The Vice-President votes only in case of a tie. As presiding officer his decisions upon points of order, like those of the Speaker, are subject to reversal by the house, and since he is not a party leader arbitrary decisions by him would be less likely to be supported. His power and influence within the body is much inferior to that of the Speaker in the House of Representatives.

Committees

Senate committees are chosen by the whole body but in practree this is a mere formality in which the Senate adopts the recommendation of the party conferences which, as in the House, act through committees on committees. The committees are virtually a duplication of those in the House, although the number is smaller by about a dozen. The Senate's power in regard to foreign relations places its Committee on Foreign Relations among its major committees. There is a Committee on Rules but its power is not nearly so great as that of the House committee, for it does not bring in special rules to change the order of business. Normally no Senator serves as chairman of more than one or as a regular member of more than two of the eight or ten most important committees known as "major committees," although a few Senators now serve on as many as three major committees. Under the rules three members from the committees on Agriculture and Forestry, Post Offices and Post Roads, Military Affairs, Naval Affairs, the District of Columbia, Commerce, and Foreign Relations are ex-officio members of the Committee on Appropriations when certain classes of appropriations affecting their respective committees are being considered. Seniority plays as great a part in the Senate as in the House committees. All bills go through three "readings" and all bills are sent to committees, but the details of procedure are much simpler than in the House. There is no committee of the whole in the Senate.

The Order of Business

The Senate opens at twelve, noon, with prayer and the reading of the Journal, followed by the "morning hour," which normally continues until two o'clock. During the "morning hour" members first present petitions sent to them by constituents and others, committee reports are made, and bills and resolutions are introduced.

This is followed by a call of the Calendar of Bills and Resolutions under Rule VIII. Under Rule VIII, as each bill is called any Senator may prevent discussion by objecting, or asking that it be passed over, unless the Senate on motion decides to go on with the discussion. If there is no objection the bill is discussed and voted upon, each Senator being limited to one speech of five minutes upon any question. This makes it possible for the Senate to consider all the bills before it and to pass those upon which no Senator entertains a doubt. It serves, therefore, much the same purpose as the Consent Calendar of the House. The call of the calendar under Rule VIII closes at two o'clock. It is possible for the Senate to leave off the call of the calendar, however, except on Mondays. The Senate sometimes avoids the whole "morning hour" by simply recessing from day to day instead of adjourning, thus continuing for several astronomical days as a single "legislative day." Only when a new "legislative day" begins will there be another "morning hour."

When the hour of two o'clock arrives, the Senate, unless it has done so already, proceeds (1) with the unfinished business of the preceding day, or (2) to the consideration of any matters that have been made the subject of a "special order" (which requires a two-thirds vote), or (3) to matters that have been placed on the Calendar of General Orders. These three classes of business have precedence in the order named. Bills on the Calendar of General Orders are considered in the order listed on

that calendar. This order of business is sometimes departed from under unanimous consent agreements.

Party Organization

Senate party organization is similar to that of the House although its influence has never been so great. The Democrats meet in a "conference" which is not binding except that members are expected to support the decision of the conference in the choice of Senate officers. Recently they have had not only a floor leader but an assistant floor leader and a whip. Temporarily, at least, they have had also an assistant whip. There is no Democratic committee on committees, but there is a steering committee of sixteen, including the whip, ex officio, of which the floor leader is chairman. The steering committee acts as a committee on committees. It may also act as a council to the floor leader in selecting legislation to be given priority on the floor of the Senate However, the floor leader may make his decisions without consulting the Steering Committee So long as his party has a majority in the Senate his recommendations are likely to be followed. The Democrats also have a policy committee of twelve members, which sometimes meets jointly with the corresponding committee of the House Democrats. So far as the policy committee has any functions they relate to national problems rather than to specific measures before the Senate. There is also a Democratic Senatorial campaign committee which consists at present of four members.

Like the Democrats, the Republicans in the Senate use a "conference" which is not binding. They also have a floor leader, and normally have an assistant floor leader who acts as whip, but the ranks of the Republicans in the Seventy-fifth Congress were so depleted that no assistant floor leader was appointed. The Republicans have a committee on committees which at present has a membership of six Senators. The Republicans now do not have a steering committee or a policy committee. The Republican Senatorial campaign committee consists of five Senators.

Unlimited Debate

The outstanding characteristics of the Senate, as compared with the House, are the greater simplicity of the rules, the almost unlimited freedom of debate, and the greater importance of the individual. Except under Rule VIII, by unanimous consent, or upon the invocation of a special rule, difficult to call up and rarely applied, there is no way to limit debate. There is no "previous question" in the Senate. A Senator may continue to talk as long as his physical strength holds out. There is no rule of relevancy in the Senate, and he may talk upon any subject he pleases, regardless of the nature of the matter before the house. This lends itself to the practice known as "filibustering." A small group of Senators, opposed to a bill before the body, talks upon it until the house is exhausted; or, a group, desirous of bringing some bill to a vote, organizes to prevent all legislation, occupying the time in speeches until the Senate agrees to consider their bill. Senators have been known to speak for hours, reading from books that had no relationship to the subject in hand, talking in a low tone, and refreshing themselves from time to time with liquid nourishment. The Senate stands by helplessly while important legislation is held up. The alternative is to surrender to the minority. Thus a few loquacious Senators may thwart the will of the remainder of the body. Filibusters formerly were especially effective at the very end of the short session when there was danger that important legislation would be lost through the termination of the session, but this has been remedied by the Twentieth Amendment.1

In 1917, the armed ship bill, sponsored by President Wilson, was defeated in a filibuster conducted by eleven Senators whom Mr. Wilson described as "wilful men." The Senate then adopted a rule which admits a form of closure. Upon a motion signed by sixteen Senators and presented to the Senate, a vote is taken, without debate, on the second day thereafter upon the question of closure on the measure named in the motion. If supported by two-thirds of those voting, that matter becomes the unfinished business of the Senate to the exclusion of all

¹ See p. 74.

other business. Senators are limited to a total of one hour each on the measure and all amendments and motions. New amendments may be offered only by unanimous consent, dilatory motions are forbidden and points of order and appeals are decided without debate. This rule has been invoked only a very few times, for Senators are reluctant to set precedents of closure. Each Senator feels that by filibustering tactics he has saved the country in the past or may need to do so in the future.

The evil effects of unlimited debate are obvious. It is questionable, however, whether a restriction would be desirable. The Senate is the only body left that can really express the public opinion of the country. The individual member of the House of Representatives cannot do so, for, as has been seen, that body is under the control of a small group of leaders who are likely to be controlled in turn by the President or are in association with him. Even a majority of the House is in practice impotent before the will of the House leadership. In the Senate alone is there left the legislative independence that is contemplated in the presidential system of government. Moreover, the Senate is the only body left to keep the administration. within proper bounds. The House will not be permitted by its leadership to cause trouble to an administration of its own party. Its controlled debates are not reported in the public press. But a Senator has the ear of the public. He may bring public opinion to the point of forcing a Senatorial investigation of alleged abuses, and administrative incompetence or worse may be uncovered. With the vastly increasing powers of the President, some such check is necessary, and a serious restriction upon Senatorial debate might cripple the Senate as an effective instrument for this purpose. It should be added too that a filibuster can delay, but cannot prevent, the passage in a later session of a meritorious measure supported by the majority opinion of the Senate.

Treatres

In giving its "consent" to treaties the Senate exercises one of its greatest powers, and at such times its sessions may become the subject of world interest. The body has been charged with

taking a too critical attitude toward treaties and asserting itself too freely. As a matter of fact, only a small part of the treaties submitted to the Senate have been altered or rejected, and in any case, since the Senate is given constitutional responsibility, it is the duty of the body to exercise independent judgment, even though disappointed Presidents and Secretaries of State may feel aggrieved at the outcome. The two-thirds vote which is required to give consent to a treaty is two-thirds of those present, provided there is a quorum. There has been some controversy over the validity of a treaty which affects matters over which the House of Representatives has jurisdiction—such matters as reciprocity treaties concerning tariff duties, or treaties which call for appropriations to which the House must agree. Probably such treaties are entirely valid, although the House might refuse to make the appropriations called for in them. In such cases the House would be entirely within its powers, but the United States would be guilty of having failed in its obligations toward the countries involved in the treaty.

Appointments

The approval of appointments is another executive power to which the Senate owes much of its prestige. The practice of "Senatorial courtesy," under which the Senate as a whole allows its approval or disapproval of appointments to depend upon the attitude of the Senators from the state in which the appointment is to be made, provided they are of the same party as the President, has resulted in effect in giving to Senators the power to name the appointees. In the past, Senatorial courtesy has dictated that when a President nominated a Senator for appointment the Senate would confirm it without further investigation. In a recent instance, when Senator Black was nominated to the Supreme Court, there seems to have been an investigation of a perfunctory nature. Subsequently allegations were made concerning Mr. Black's previous association with the Ku Klux Klan and questions were raised upon his qualifications as a judge. It is likely that the Senate will proceed with more care in the future, at least when Senators are nominated to the Supreme

Court. The patronage of the less important offices is left to members of the House of Representatives. The Senate seldom rejects a Presidential appointment to a cabinet post since it is recognized that the President should be free to choose his immediate advisers.

The patronage of positions around the Senate wing of the Capitol, except the personal staff of each Senator, is determined by dividing the total salaries by the number of Senators and then assigning positions aggregating the quotient as nearly as possible to each Senator. They usually get about two appointments each.

Public Proceedings

In its early history the Senate always met in secret, and the House occasionally did so. At present the House never meets in secret. Until recently the Senate met in secret "executive session" upon treaties and appointments, although not upon other matters. The tendency, however, is toward publicity. The League of Nations treaty, for instance, was discussed in open session and other treaties since that time have been discussed publicly. Even the executive sessions, however, were not kept completely from the public, for, while the public was excluded, there appeared promptly and mysteriously in the newspapers a summary of what went on in the "secret" session. The old idea of secret sessions seems about to disappear in all legislative bodies.

The admission of ladies to the galleries of legislative bodies has not always been looked upon with favor. Even the American House of Representatives did not at first admit women to the galleries, and, according to Mr. Luce in his Legislative Procedure, as late as 1820 we find John Randolph protesting against their presence: "Mr. Speaker, what pray are all these women doing here, so out of place in this arena? Sir, they had much better be at home attending to their knitting."

The Senate like the House must keep a Journal, and the debates, unless they are in "executive session," are reported in the Congressional Record. The Senate does not make use of the "leave to print" to set forth speeches that have not been made,

as does the House. The reason is obvious. A Senator can secure the floor easily to deliver his speeches before the body itself. Senators do, however, secure permission to reproduce newspaper articles and speeches by others, although this practice is now frowned upon in the lower house.

Impeachment Trials

The Senate is the court for the trial of impeachments. The Constitution provides for the impeachment and trial of the President, Vice-President, and "all civil officers of the United States." In the case of Senator Blount of Tennessee, the Senate by a vote of 14 to 17 took the position that Senators (and presumably Representatives) are not "civil officers of the United States" within the meaning of the clause. A member of either house is subject to expulsion by a two-thirds vote of the house of which he is a member. Officers of the territories and the District of Columbia would appear not to be civil officers of the United States within the meaning of the impeachment clause. This was the conclusion reached by the Committee on the Judiciary of the House of Representatives in reporting upon an impeachment proposal affecting a commissioner of the District of Columbia (60th Cong, 1st Session) Up to the present the only officers who have been found guilty have been judges. President Johnson was impeached by the House but was not found guilty in the Senate That case grew out of an attempt by Congress to limit the President in his power of removal, and the Supreme Court in Myers v. United States, in 1926, upheld the position taken by Johnson, that administrative officers, even when appointed by the President by and with the advice and consent of the Senate and by law removable by and with the advice and consent of the Senate, are nevertheless removable by the President alone, since his power to remove purely administrative officers cannot be restricted.2

There has been some question whether an impeached officer can escape trial by resigning. In the case of William W. Belknap, who had been Secretary of War, but had resigned, this

²See p 156

question was raised in the Senate, but the Senate held that it could nevertheless proceed with the trial. As this was a subsidiary question it required only a majority vote for decision. However, a two-thirds vote is necessary to convict, and it appears that the failure to get a two-thirds vote in that case was due in part to a belief on the part of some Senators that resignation removes the accused from the jurisdiction of the Senate. Of the twenty-five Senators who voted "Not guilty," twenty-two announced that they did so because they believed the Senate did not have jurisdiction.

The grounds for impeachment are "Treason, Bribery, or other high Crimes and Misdemeanors" (Article II, Section 4). Treason against the United States is defined as consisting only in levving war against the United States, or in adhering to their enemies, giving them aid and comfort (Article III, Section 3). The testimony of two witnesses to the same overt act or confession in open court is necessary for conviction. It would appear that this applies to impeachment as well as to other trials. Impeachment and trial would appear to be the only means of removing a President or federal judge from office. In the case of Judge John Pickering, information was offered, including a statement from his son, to the effect that he was insane at the time of the commission of the alleged offenses. If insane he could not be guilty of a crime, but the Senate, wording the question so as to evade a decision upon the matter of his guilt or innocence of crimes or misdemeanors, simply found him guilty of the alleged offenses, involving dereliction of duty and intemperate language on the bench, and removed him from office. Unfortunately, such cases leave an undeserved stigma on the reputation of the officer who is found guilty, but no other method of removal appears to exist. The problem might possibly be solved in such cases, however, by assigning another judge to the court, leaving the former occupant without an assignment.

Conviction by the Senate cannot carry a greater penalty than removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. However, the ordinary courts are not prevented by the fact that impeachment charges have been made and acted upon from taking

jurisdiction of a case and applying the penalties provided by law (Article I, Section 3). The President could be so tried after removal.

In the trial of impeachment cases the Senate sits as a court under a special procedure which is designed to give a judicial dignity to the proceedings and to protect the accused from arbitrary or ill-considered action. The case against the accused is conducted by "managers" from the House of Representatives, the parties are permitted to employ counsel, the accused may appear in person or by attorney although the trial may proceed without such appearance, and witnesses may be summoned and compelled to appear. Senators are placed under oath or affirmation. The Vice-President presides in cases other than the trial of a President. In such a case, the Constitution provides that the Chief Justice shall preside. Since the Vice-President would succeed to the Presidency in case of conviction, he would hardly be a fit person to preside at the trial.

Differences Between the Houses

With a bicameral legislature there must be some method of reconciling differences between the houses. In Great Britain this is solved by giving a supremacy to the House of Commons. The Lords may hold up a money bill for only thirty days after which, with the king's approval, it becomes law. Other public bills can be repassed in three successive sessions by the House of Commons within a period of two years, in which case the assent of the Lords is not necessary.

In our Congress the houses are practically coordinate. It is true that tax bills must originate in the House of Representatives, but the Senate has a power of amendment which it uses freely. It can rewrite the whole bill after it has been sent up by the House, and so its position is not really subordinate. It is true too that by custom the great appropriation bills originate in the lower house, but here again the Senate does not surrender its power of amendment. Disagreements between the two houses must be settled by negotiation between them. If either chooses to recede from its position the difficulty is thus adjusted. In

most cases, however, the process followed is to appoint promptly a conference committee. A conference committee is really two committees, one from each house, which meet for the purpose of adjusting differences. There are usually three, sometimes five, members from each house. They are chosen nearly always by seniority from the committee in charge of the bill, with a majority on the committee from the majority party. Thus they usually include the chairman and the ranking majority and minority members of the committee.

By custom the conferees meet in the Senate wing of the Capitol building. There has been much discussion as to whether Senate or House members have the advantage. Senators on the whole are older, have had longer service, and enjoy greater prestige. On the other hand, House members serve on fewer committees than Senators and thus have the advantage of greater specialization. Meetings of conference committees are nearly always secret, although testimony may be called for from outsiders. They are limited in their jurisdiction to the points of difference between the two houses. Nevertheless, the power of the conference committee is great, for the differences between the two houses may be such as to leave them much leeway. Where an amendment to a bill strikes out all after the enacting clause the conferees have the entire subject before them.

After the conference committees have agreed, their report goes back to the houses for action. The rules of both houses give this report a highly privileged status. Those of the House of Representatives permit it to be presented at any time except when the Journal is being read, while the roll is being called, or a vote is in progress. Those of the Senate permit it to be presented at any time except when the Journal is being read, or a question of order or motion to adjourn is pending, or while the Senate is voting. It must be accepted or rejected as a whole in each house without amendment. Under these circumstances it is likely to be accepted, for in effect it represents the last chance to pass the bill in any form during that session. This is more especially true since the conference reports are likely to be brought in during the rush of the closing days of a session. An interesting result, therefore, of our bicameral system has been the estab-

lishment of the conference committee as a kind of third chamber, fluctuating in personnel, which may in effect write a whole new bill under its power to reconcile differences. The conference committee is particularly open to criticism because of the fact that its decisions are reached in secret.

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CHAPTER VIII

The President

The Expansion of the Executive

Of the three great departments of government, the executive appears now to be growing most in influence. At the same time that power is passing from the states to the federal government, there is a tendency to center the powers of the federal government around the President. More than ever before, therefore, he has become the dominating figure in the United States.

The Electors

The President is elected every fourth year by electors chosen by the voters at the general election on the Tuesday next after the first Monday in November. Each state is entitled to as many electors as it has seats in the Senate and House of Representatives.

The plan of using electors was devised because the voter in the latter part of the eighteenth century could not possibly know the qualifications of the candidates. No telephones, no telegraphs, no railways, no speedy means of communication, newspapers with very little information published at best as weeklies, made it desirable that a select group of men should assemble in each state to cast their votes for President as they best saw fit. Gradually the rapid dissemination of knowledge through the press and the enlargement of the franchise demonstrated that the voter could be trusted. The electors soon became merely cogs in the machine.

The Choice of Electors

Electors were at the beginning chosen in most states by the

legislature. Another method followed in some states in the early period was election of two electors at large and the remainder by districts. Today, the practice is to elect them all at large, that is, from the state as a whole.

The electors for each party in a state may be nominated by a convention but usually are nominated at a primary election. The number allotted to each state equals the number of Representatives and Senators it has in Congress.

The Vote of Electors

The electors receiving certificates of election from the executive in their state meet on the first Monday after the second Wednesday in December. Sextuple copies of the vote for President and for Vice-President are taken and to each copy is affixed an official list of the electors. One set is sent by registered mail to the president of the Senate; two sets are placed on file with the Secretary of State of the state in which the electors sit; two sets are sent by registered mail to the Secretary of State of the United States; and the sixth set is delivered to the judge of the United States district in which they sit. The idea is that if the first set is lost other sets will be available for the president of the Senate. Of course it is a part of the unwritten constitution of the United States that the electors shall cast their votes in accordance with the popular vote that elected them. No penalty would attach if an elector should deviate, but no elector, since Plumer of New Hampshire did so in the second election of Monroe, has deviated from his instructions. We know therefore as soon as the popular vote has been counted, who the electors are and what Presidential candidate is elected.

Counting the Vote

On the sixth of January following the general election the Senators and Representatives meet together in the House of Representatives for counting the electoral vote. The president of the Senate presides. Two tellers of different parties have already been designated from each house. The president of the

Senate opens and delivers to them all the certificates and papers pertaining to the electoral votes. The tellers make a table of the states in alphabetical order, insert the electoral votes as cast, and make their report to the president of the Senate who announces the result. If one candidate for President has a majority of the electoral votes and one candidate for Vice-President has likewise a majority, these are elected

If no candidate for the Vice-Presidency has a majority the election goes to the Senate. Each Senator has one vote and he may cast it for one of the two candidates standing highest on the list. A quorum for this purpose consists of two-thirds of the whole number of Senators. An absolute majority, a majority of all the members, is required for election. Richard Mentor Johnson, Vice-President under van Buren, was elected by the Senate in this manner.

If no Presidential candidate has a majority of the electoral vote, the election goes to the House of Representatives. The delegation from each state has one vote. It may be cast for one of the three candidates standing highest on the list. Representatives from two-thirds of the states must be present to form a quorum, and it requires a majority of all of the states to elect.

Electron by the Houses

The Twentieth Amendment sets noon on the third day of January as the beginning of the new Congress, and noon of the twentieth day of January as the beginning of a new term for President and Vice-President. This normally should give the houses of Congress sufficient time to choose the new President and Vice-President in the event of a failure of the electoral college to do so. However, in the event that no new President has been chosen or the President-elect has failed to qualify, the Vice-President-elect will, under the Amendment, act as President until a President qualify, Congress is authorized to provide by law for one to act as President until a President or Vice-President has qualified. Since persons who have been voted upon in the elec-

toral college may die before Congress has met and acted, the Amendment authorizes Congress to provide by law a method of meeting this exigency.

The Succession to the Presidency

Congress provided in 1886 a method of succession to the Presidency in the event of the removal, death, resignation, or inability of both the President and the Vice-President. This law names the Secretary of State as the successor provided his appointment as Secretary has been made with the advice and consent of the Senate and provided he qualifies. The other cabinet officers follow him, in the order of the creation of their departments, except that the Secretaries of Agriculture, Commerce, and Labor are not mentioned since these department heads did not exist at that time. While this law had no direct constitutional sanction it would without doubt be accepted as a valid exercise of Congressional power, especially since an act of Congress appears to be the only solution of this problem.1 In the event of the death of the Vice-President, there is no method of choosing a new Vice-President, but his duties as presiding officer of the Senate would be exercised by the President pro tempore of the Senate.

The Jefferson and Burr Contest of 1800

Thomas Jefferson and John Quincy Adams were elected by the House of Representatives. The Jefferson-Burr controversy came up under the original provision in the Constitution for the election of the President. Each elector had two votes which he cast for two candidates for President. Under the original plan there were no candidates for Vice-President. The one that received the largest number of electoral votes, provided it was a majority, was declared President. The one that received the next highest number of votes, provided it was a majority, was declared elected as Vice-President. Jefferson and Burr received an equal number of votes, seventy-three, and both had a majority. To resolve this difficulty the election was thrown into the House. On the thirty-sixth ballot Jefferson was elected President, prob-

¹ See p 161.

ably due to the moving appeal made by Alexander Hamilton. Aaron Burr automatically became Vice-President.

As a result of the election of 1800 the Twelfth Amendment was proposed by a two-thirds vote of both houses of Congress and ratified by three-fourths of the state legislatures in 1804. This provided for separate ballots for President and Vice-President.

The Contested Electron of 1824

A failure of the electors to cast a majority vote for a candidate occurred in 1824. The five candidates were all prominent in political life. Three of them held positions in President Monroe's cabinet. John Quincy Adams was Secretary of State, William H. Crawford was Secretary of the Treasury, and John C. Calhoun was Secretary of War. Henry Clay was Speaker. Andrew Jackson, soldier, politician, popular leader, and representative of the hopes of the pioneers everywhere, polled the largest vote, ninety-nine. Adams polled eighty-four; Crawford, forty-one; and Clay, thirty-seven. Calhoun consented to accept the Vice-Presidency.

Clay was eliminated from the ballot in the House because he did not stand among the first three on the list. Thirteen votes of the twenty-four state delegations were necessary for a choice. On the first ballot Jackson had seven, Adams had seven, and Crawford had four. Six state delegations abstained from voting. Clay as Speaker wielded considerable influence and persuaded four of the abstaining delegations to vote for Adams. New York and Illinois fell into line. That gave Adams the necessary thirteen votes. As President he appointed Clay as his Secretary of State, which caused the followers of Jackson to cry out that Clay had sold his influence in the House for a cabinet position and that Adams had bought the Presidency. Historians have found no evidence to substantiate a bargain between the two.

The Electron of 1876

The election in 1876 failed to determine whether Rutherford B. Hayes or Samuel J. Tilden should be President. This was because of disputed returns from South Carolina, Florida, and

Louisiana, and the dispute about one electoral vote from Oregon. The contested electoral votes amounted to twenty. Hayes had 165; Tilden had 184. One more vote for Tilden would be sufficient to elect him. If all of the disputed votes should go to Hayes he would be elected.

This matter of disputed electoral returns was a new problem. No Constitutional or legal provision existed for coping with it. Congress created a commission to be composed of five Representatives, five Senators, and five judges of the Supreme Court. The House being Democratic designated three Democrats, Payne, Hunton, Abbott, and two Republicans, Hoar and Garfield. The Senate being Republican designated three Republicans, Edmunds, Frelinghuysen, Morton, and two Democrats, Thurman and Bayard. Two Republican justices, Strong and Miller, and two Democratic justices, Clifford and Field, were easily found. It was understood when the commission was being contemplated that the four justices would select Justice David Davis as the all-important fifteenth member. He was thought to be independent. But the Democrats and the Independents in the legislature of Illinois united in electing him a United States Senator on the very day that the bill setting up the electoral commission was introduced in the House of Representatives. As someone put it, "He was transferred from the bench to the fence." His later course indicates that he probably would have acted in a judicial manner on the commission. However, although he had not yet resigned his position on the Court, he felt impelled to refuse to serve. Justice Bradley, a Republican, was named as the fifteenth member of the commission.

In Oregon, a Republican deputy postmaster, Watts, had been elected to the electoral college. The governor ruled that Postmaster Watts was ineligible since he could not hold two federal offices at the same time and gave the certificate to Cronin, a Democrat, who had polled the next largest number of votes. The commission found, by a bare majority, that although Watts had been elected while postmaster, he had, before he cast his vote, resigned as postmaster and as elector and had in accordance with the provision of law been appointed an elector by the

other Republican electors from Oregon. Although Watts may have resorted to chicanery in complying with the legal requirements, the commission's decision might be justified on the ground that it was in accord with the popular vote.

In South Carolina the governor certified the election of the Republican electors on the face of the returns, but he also gave certificates of election to the Democratic electors on the ground that the presence of federal troops near the polling places had prevented a free and fair election. In Louisiana two governments existed, and each of the governors certified to the election of his party's electors. In Florida, the Republican governor, Stearns, had given certificates to the Republican electors. The attorney general had given certificates to the Democratic electors. The new governor, Drew, a Democrat, elected at the same time as the electors, gave a certificate to the Democratic electors and enclosed a decision of the circuit court of Florida holding that the Republican electors were not entitled to office under Florida law. In each instance the commission decided on party lines, eight to seven, in favor of the Republican electors.

There is much testimony by leading men and by newspapers indicating that at the time a considerable group thought the decision was unfair. It needs to be remembered that the decision was made within ten years of the close of the Civil War. All of the Southern states except these three had thrown off the Republican regime imposed by federal troops, Northern carpetbaggers, and the enfranchised Negroes. In these three states the Democrats struggled fiercely and it would seem now with pardonable ruthlessness for supremacy. Certain it is that after the native sons had finally established themselves in the political control of these states, not one of them returned Republican electors until Florida did so for Hoover in 1928.

Amid criticism, discontent, and economic unrest Hayes was declared elected. His right to the office of President was highly insecure. He announced that he would never be a candidate again. Samuel J. Tilden accepted the decision of the commission as final. Be it said to his everlasting credit that no one did more to quiet apprehension and to instil public confidence in the outcome than did Tilden.

The Act of 1887

A similar situation will not arise again. Congress passed an act in 1887 providing that each state might by judicial or other methods of procedure decide upon which persons have been chosen as electors from that state. The provisions of this act of 1887 are somewhat complicated, but in general a decision reached by the state authorities is final unless rejected by both houses of Congress acting separately, but if the state fails to provide a settlement of a dispute upon its electors, the votes of the state are lost unless the two houses of Congress agree separately upon a decision.

Proposals For Change

Numerous changes in the method of electing the President have been advocated. Amendments to the Constitution on this subject have been introduced in both houses of Congress. The burden of such proposals has been that the electors should be abolished and a provision be made for direct popular vote.

Illogical and out of harmony with political progress, the plan for electing the President nevertheless has worked well and has adapted itself to its purpose as any good organism does.

Manority Presidents

The electoral system seldom returns an electoral vote proportioned exactly to the popular vote.

In the election of 1888, when Grover Cleveland and Benjamin Harrison were the leading candidates, Harrison obtained a majority of the electoral vote and Cleveland a small plurality of the popular vote. Harrison became what is called a minority President. This disproportion between the popular vote and the electoral vote comes about through the fact that the electors are chosen from each state at large, and the party that is in a majority in a state usually elects its whole slate of electors even though its popular majority is very slight. Where the winning candidate for the Presidency has carried his states by only slight majorities and the losing candidate has carried his states by

heavy majorities, it is possible that the total popular vote of the loser will be greater than that of the winner. If the popular vote of the loser had been more evenly distributed throughout the country he would have had majorities in more states and would have carried the electoral votes of those states.

Where there are three strong candidates in the field, the winner is likely to be a "minority President," for the combined popular votes of his opponents are likely to be greater than his own. A "plurality" of popular votes in any state, that is, one more vote than those of any other candidate, carries the electoral vote of that state.

Qualifications for President and Vice-President

The Constitutional qualifications of the President are that he be at least thirty-five years of age, a natural-born American citizen, and "fourteen Years a Resident within the United States" (Article II, Section 1). If born abroad of American parents he would qualify as a natural-born citizen. The Constitution does not specify that he be a "native-born" citizen.

The Constitution carried an alternative, now obsolete, to the requirement that the President be a natural-born citizen, permitting as an alternative that he should have been a citizen of the United States at the time of the adoption of the Constitution. This alternative is reported to have been inserted as a tribute to Alexander Hamilton. He was born on the island of Nevis in the British West Indies and it was thought that a man of his ability should not thereby be disqualified. However, strictly speaking all of the Presidents down to Van Buren were born British subjects in the American colonies and the clause would have applied to them as well.

Compensation

The compensation of the President is \$75,000 a year in salary, \$25,000 a year for traveling expenses, and a fund for contingent expenses including stationery, telegrams, automobiles, and special services, amounting to nearly \$50,000. Of course the White House is given him for a residence. The compensation of the

Vice-President is \$15,000 This is the same as that of the Speaker of the House of Representatives. Neither the Vice-President nor the Speaker is provided with a residence.

The Growth of the Presidency

The growth of the federal government since 1789 has been around the President. He wields the most dynamic power of any officer or of any department of the government.

Under the Articles of Confederation there was no executive department. The framers of the Constitution conceived of Congress as the most important of the three departments. This was quite natural because of their experience with the colonial legislatures and because of the supremacy in which the Parliament in Great Britain had established itself. In the Constitution each department was treated in a separate article and the minutes show that the intent was that the three departments should be considered as coordinate, although there is nowhere in the document an express mention of that fact. As late as 1885, Woodrow Wilson in his Congressional Government thought that Congress still held the dominant position. At the present time, the Presidency has assumed the dominant position among the departments of government.

The Basis of the President's Power

The President derives his powers from the Constitution, from statutes passed in accordance with it, and from treaties made under the authority of the United States. Men of initiative and vigor in the office have caused the powers of the executive to grow. The only direct control possessed by Congress over his actions is in the power of impeachment. The courts may not reach him. The President could commit a crime and presumably would remain for the period of his official term immune from prosecution in the courts. The good behavior of our Presidents has prevented the testing of this immunity.

Independence of the Courts

The President probably has no duties that would be consid-

ered clerical or ministerial. If he had, he might be reached through legal action just as his cabinet officers may. Instead, his duties appear to be entirely discretionary. That is, they are duties calling for the exercise of his own judgment. In the exercise of such powers the President cannot be restrained by the courts. The reasoning in Marbury v. Madison leaves that inference. Mississippi did seek to enjoin President Johnson from enforcing the Reconstruction Act, an act to which he had unsuccessfully applied the veto. The decision of the Supreme Court was that an injunction would not lie against the President while wielding discretionary powers (Mississippi v. Johnson). The President may not be summoned as a witness. President Jefferson set the precedent when he refused to heed the summons issued by Chief Justice Marshall while sitting on the circuit bench at Richmond in the trial of Aaron Burr.

One of the most extraordinary instances of the exercise of Presidential power is found in Ex parte Merryman. President Lincoln had authorized military officers to suspend the writ of habeas corpus in certain cases in the interest of public safety. John Merryman of Baltimore was arrested on a charge of treason and confined in Fort McHenry, under orders of Major General Keim. A petition on behalf of Merryman for a writ of habeas corpus was filed with Chief Justice Taney, who directed General Cadwalader in command of Fort McHenry to bring-Merryman into court for a hearing. Cadwalader sent Colonel Lee with a note explaining the situation and requested postponement until he should receive instructions from the President. Taney issued a writ of attachment for contempt against Cadwalader to appear the next day at noon. The United States marshal was directed to serve the writ. The marshal was met at the gate of the fort and refused admission and so reported. Taney then wrote an opinion holding that the President could not without express authorization by Congress suspend the writ of habeas corpus or authorize others to do so. He could not authorize arrests except in aid of judicial authority. A copy of the opinion was transmitted to the President. Lincoln felt that the public danger was so great that he was justified in refusing to release Merryman, but he did ask Congress to authorize him to

suspend the writ of habeas corpus. Congress did so on March 3, 1863.

Judicial Powers

The powers of the President may be divided into three classes—judicial, legislative, and executive. Whether he has any true judicial power may well be questioned. However, he has the power to grant pardons, reprieves, commutations, and amnesties, and these powers may be considered judicial since they were at one time in English history exercised by the courts. Moreover, the President, or the Attorney General for him, reviews the evidence in such cases, takes into consideration the procedure followed by the courts that have passed sentence, and studies the interpretation that has been made of the law. This may be considered a judicial function.

The President's pardons may be either full or conditional. The full pardon wipes out the offense in the eyes of the law as though it had never been committed. The conditional pardon carries a stipulation that the convict must do something either before or after the pardon becomes effective, such as that he will lead a law-abiding life. The conditions may not extend beyond the term for which he was sentenced. A parole is a form of conditional pardon. There is one instance of an attempt to refuse a Presidential pardon. A prisoner had escaped from federal custody and committed murder in Connecticut. The state authorities did not feel free to execute him until the United States had released its claim upon him. The President granted him a pardon in the form of a commutation of sentence which herefused to accept, insisting upon being returned to the federal penitentiary to serve his term and that the state authorities be prevented from carrying out the death sentence. However, the federal courts, without passing upon the effect of his refusal to accept the commutation, held that the state courts had jurisdiction to try and punish the offender (Chapman v. Scott).

There is no limitation upon the President's power of pardon for offenses against the United States except in cases of impeachment. He may even extend a pardon before the person has been convicted in court. The question has arisen several times

as to whether the President can extend a pardon for contempt of court. Probably, the President cannot pardon for what is called civil contempt, that is, failure to obey an order of the court which is issued an behalf of another party. Such orders often are issued incidental to the settlement of civil cases, and the party in whose behalf the order is issued has an interest in the matter. A pardon for a contempt of such an order would amount to executive interference in a case between two individuals. On the other hand, violation of an order in a criminal case, or a disturbance committed by an individual in the presence of the court, is a contempt in which the state alone is concerned. These contempts, which are called criminal contempts, the President may pardon. A recent decision on the subject of a pardon for criminal contempt was that of the Supreme Court in the case of Ex parte Grossman. Grossman had been enjoined in 1920 by a United States District Court from selling liquor at his place of business in Chicago. He was found guilty of violating the injunction and was sentenced to a year in the Chicago House of Correction and to pay a fine of \$1,000 and costs. In December, 1923, President Harding pardoned him on condition that the fine be paid. Grossman paid the fine and was released. But the District Court ordered him to be committed to the house of correction to serve his term, notwithstanding the pardon. The case was carried to the Supreme Court and Chief Justice Taft handed down the decision. He revealed that in twenty-seven instances, covering a period of eighty-five years, criminal contempts of federal courts had been pardoned by the President. In the opinion in this case, Chief Justice Taft said: "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law." The Court ordered that Grossman be discharged.

In addition to the power of granting full and conditional pardons the President may grant reprieves, commutations, and amnesties. A reprieve is a stay of the execution of a sentence. A commutation is a change from a heavier to a lighter penalty. An amnesty is a pardon in advance of trial and usually refers to a group of people. For instance, at the close of the Civil War, President Johnson's third proclamation of amnesty, on July 4,

1868, pardoned every person who had participated in the war on the Confederate side, except for any that were under indictment at the time. The amnesty carried with it the return of property, except slaves.

The power of the President to grant amnesty cannot be limited by Congress. A. H. Garland had been admitted to practice before the federal courts before the Civil War. When his state, Arkansas, seceded, he joined the Confederacy, and served in the lower and the upper house of the Confederate Congress. Under an early amnesty proclamation he applied for and received a pardon, July, 1865. An act of Congress had been passed, January 24, 1865, prescribing that no person should be permitted to practice before any federal court unless he had taken the socalled Iron-clad oath. This oath specified that the lawyer had never borne arms against the United States, that he had never given voluntary aid to enemies of the United States nor had sought or accepted any office under the Confederacy. Garland 'could not take the oath. Moreover, he was proud of his record as a Confederate. But he had been legislated out of the right to practice law in the federal courts. Counsel for Garland contended that the act of Congress was void on four grounds. It was a bill of attainder: it imposed a punishment by legislative action without permitting a trial in the courts. It was an ex post facto law in that it imposed a penalty for something that was not a crime before the law was passed. The regulation of admission to practice before the courts was not a legislative function but rested with the courts themselves. Finally, the law attempted to restrict the pardoning power of the President in a manner which was not authorized by the Constitution. Garland won on all four points (Ex parte Garland). Partly, no doubt, because of his victory in this case, he later became Attorney General in Cleveland's cabinet.

Legislative Powers

The President exercises legislative power through his message to Congress, the veto, the signing of bills, the issuing of ordinances or proclamations, and the negotiation and ratification of treaties. He may also influence legislation by appeal to public

opinion and by virtue of his position as leader of his party. To this list may be added the use of the Presidential appointing power and the distribution of expenditures in the states from lump-sum appropriations, for these are effective means of bringing recalcitrant Congressmen into line upon matters of legislation.

The Message

Washington and John Adams delivered their messages to Congress in person. Jefferson, possessing a facile pen and being rather ill at ease in a speech, preferred to send his messages. This practice of sending messages to Congress prevailed until President Wilson chose to deliver his more important messages in person. Whether the message has much influence upon lawmaking depends largely upon the personality and persistence of the President and upon the attitude of Congress. President Wilson was extraordinarily successful in securing action upon his proposal for reform in the banking and currency system which culminated in the Federal Reserve System. The facilitation of credit for farmers appeared to him timely. Congress responded with provisions for the Federal Farm Loan Board. He advocated that the debatable ground around the Sherman Anti-Trust Act should be reduced, and the act clarified and its administration made more fair. This resulted in the Clayton Act and the Trade Commission Act. He felt that Puerto Rico and the Philippines should be given enlarged self-government. In due time, Congress enacted the Jones Act, which still forms the fundamental charter of liberties for Puerto Rico. He urged and Congress enacted a territorial form of government for Alaska. He asked for and Congress granted an employers' liability act for railway employees. Only one measure of internal reform which he advocated failed to receive serious consideration and that was largely because it was not thoroughly thought through. This was his proposal for the prompt enactment of legislation to provide primary elections for the choice by the voters of Presidential candidates.

The Veto

In English history the veto was a result of the shrinking of

the legislative power of the king. In early times Parliament would petition the king for specific legislation. He would formulate the law as he wished it to be and proclaim it. Occasionally he would ignore the substance of the petition entirely. As the power of Parliament over legislation grew, the members drafted their own bills, passed them in due form, and presented them to the king for his signature. He had the option of signing or of refusing to sign. Today the king does not have even this option. For more than two hundred years no British king has exercised the veto. He signs bills as a matter of course.

The President has two kinds of veto, the limited veto and the pocket veto. Under the limited veto he refuses to sign'the bill and sends it back to the house in which it originated with his objections. This must be done within ten days, Sundays excepted, after the bill has been submitted to him; otherwise it becomes a law without his signature. His veto is not absolute, however, for Congress may override his negative by a two-thirds vote of those present in each house, provided there is a quorum present. Congress should adjourn before the ten days are up, he may refuse to sign it and does not need to return it to Congress. This latter is termed pocket veto. It is an absolute negative, for figuratively he puts the bill in his pocket and Congress can do nothing about the matter except pass the bill anew at a later session. The adjournment of Congress at the close of a session is an "adjournment" within the meaning of the pocket veto provision; that is, when Congress adjourns at the close of a session, or at the close of a Congress, the failure of the President to sign bills within ten days constitutes a pocket veto (The Pocket Veto Case).

Only four of the Presidents who have served a full term have made no use of the veto: the Adamses, Jefferson, and Van Buren. The same can be said of four others who served less than a full term: W. H. Harrison, Tyler, Fillmore, and Garfield. The veto has been exercised about six hundred times. Nearly half of the vetoes have been applied to private pension bills; of these President Cleveland vetoed two hundred and sixty. Hamilton stated in the Federalist that the purpose of the veto was to enable the President to protect himself against encroachments by Congress and to prevent hasty and unwise legislation. Vetoes be-

come more frequent when the President and Congress differ politically.

The President cannot recall a veto. President Grant tried unsuccessfully twice to bring back bills which he had sent back with his objections. Neither can he veto single items in an appropriation bill as can many of the governors in the states.

The veto has proved useful. It has repeatedly curbed the expenditure of public money. Even the threat of a veto has had that effect. That a veto may be overridden affords a guarantee against abuse, although in fact very few have been overridden. The first instance came in Tyler's administration. Johnson's vetoes were overridden fifteen times, but his position in relation to Congress was unusual. Wilson and Grant and Coolidge were reversed about four times each. A number of Presidents have experienced one or two such reversals.

The President has ten days in which to consider a bill. At the end of that time he may do one of three things, sign the bill, veto it, or let it become a law without his signature. If Congress should adjourn within the ten days and thus prevent its return, he may exercise the pocket veto. In the past, at the end of a session Presidents have gone to the President's room in the Capitol and there, before Congress adjourned, signed such measures as they approved. However, in 1932, in the case of Edwards v. United States, the Supreme Court held valid an act which the President had signed after the adjournment of Congress but within ten days after it was presented to him. It is, therefore, no longer necessary for the President to hurry through the bills passed in the last hours of a Congress. He may take the usual ten days for study before taking action.

The Ordinance Power

Strictly speaking, the ordinance power of the President has no Constitutional basis. It existed, however, in Great Britain and in several, if not all, of the European countries at the time of the drafting of the United States Constitution. The courts frequently state that Congress may not delegate its legislative authority. But Congress may prescribe the limits within which ex-

ecutive discretion can be exercised. Pragmatically, Congress does increasingly delegate its power to supplement general legislation with detailed rules and regulations that have the full effect of law. The Interstate Commerce Commission exercises this power in fixing rates and in issuing safety regulations. Numerous regulations have been issued by the Department of Agriculture under pure food and drugs acts. Flexible tariff provisions in effect permit the President to raise or lower the tariff within certain limitations.2

Especially during wartime and in other emergencies the President's power of issuing ordinances has been increased. The draft act of the World War was very short but the regulations for its execution cover nearly a hundred pages. President Wilson could regulate and prohibit exports, take over and operate enemy vessels for use in the war, fix the price of fuel and food, and regulate the production and distribution of these commodities. He could and did prescribe the duties of the Enemy Alien Property Custodian, censor the mails, stop trading with the enemy, and regulate priorities in production and transportation. The President continuously supervises and modifies the civil service rules and the regulations for the collection of internal revenue.

Should the President exceed his power under a given statute and the matter be brought into court, the court will not hesitate to declare the ordinance invalid. The Panama Refining Company decision was based upon this principle, as was the National Industrial Recovery Act decision in part.3

The tendency of Congress in recent years has been to rely more and more upon executive discretion. Consequently, rules and orders issued under Congressional authority have built up a considerable body of administrative law.

The President exercises his ordinance-making power through executive orders and proclamations. These, as well as similar orders issued in the government departments by other officers, are now published in the Federal Register, unless the order appears to have no public significance.

Occasionally, the President issues a proclamation which merely

² See p 237. ³ See p 624

expresses an opinion or sentiment. As an example, the Thanks-giving proclamation creates no legal rights or duties. Any legal effect of such a proclamation as a holiday depends upon legislative acts, either in Congress or in the state legislatures.

Treaties and Executive Agreements

Treaties made under the authority of the United States are a part of the supreme law of the land. The Secretary of State supervises the negotiation of treaties under the direction of the President. A two-thirds vote of the Senate is required for approval, provided a quorum is present. The Senate may also advise the President during the negotiations. In early days the President sought this advice. Senator Maclay in his journal, the entry for August 22, 1789, described how President Washington appeared in the Senate chamber to obtain the advice and consent of the Senate to a treaty with the Creek Indians of Georgia. The Senate insisted on having the treaty sent to a committee, which caused Washington to lose patience and to vow that he would never appear for that purpose again. He never did. No President since his time has done so. Nevertheless, the Senate continued to give advice previous to and during the negotiations of a treaty. This practice takes place even now in an informal manner.

In connection with Jay's Treaty several precedents were set that have since been followed. The instructions to Jay were not submitted to the Senate for approval. The Jay Treaty provided for the payment of various sums of money. Not until after the Senate had approved the treaty was the House consulted. The House came near to refusing to acquiesce in the appropriation; but a persuasive speech by Fisher Ames saved the day. The House could refuse its consent to an appropriation to satisfy a stipulation in a treaty, although it has never done so. Treaty provisions affecting customs are, in practice, submitted to both houses of Congress on the ground that they are in substance revenue bills.

During the debate on the Jay Treaty the House passed a resolution peremptorily requesting the President to submit information and papers pertaining to the treaty. Washington refused on

the ground that to furnish the information might be incompatible with the public interest. For the President to comply with such a request would tend to subordinate the executive to the legislative department. Since that time requests for information from either house of Congress have been conditioned upon the President's discretion.

Jay's Treaty carried the first extradition provisions, those for murder and forgery, to which the United States has been a party. In 1799, Great Britain asked for Thomas Nash, charged with murder. Upon the order of President Adams he was arrested and delivered without a judicial hearing to the British authorities. He was tried in London and executed Not until 1848 did Congress enact a law by which requests for extradition may be lodged with a court of record of general jurisdiction which hears the evidence and determines whether the request comes under the treaty. Even so, the act of surrender to the authorities of the extraditing country belongs to the discretion of the President.

Treaties may require supplementary legislation for proper enforcement. For example, the Migratory Bird Treaty with Canada contains no regulations for its enforcement and no penalties for its violation. Congress has passed legislation to make the treaty effective. On the other hand, a treaty affecting the inheritance of property by aliens may be sufficient in itself.

It is probably correct to say that never has a treaty or a provision thereof been declared unconstitutional. Under the Constitution a law must be in pursuance of the Constitution, while the requirement for a treaty is that it be made under the authority of the United States. No doubt there are limits to the subjects that may be regulated by treaty, but nevertheless the treaty-making power is a broad one. An act dealing with the killing of migratory birds when passed to enforce a treaty with Great Britain has been upheld, while an act upon that subject without a treaty would have been invalid (Missouri v. Holland). In case of conflict between a statute and a treaty, the difficulty is resolved so far as domestic law is concerned in favor of the one made last. Should a statute supersede a treaty the international obligation will remain for the United States to settle.

A treaty may be canceled by the negotiation of a new treaty.

The President may terminate it by giving notice in accordance with the terms of the treaty. This is sometimes called the denunciation of a treaty. Occasionally, one of the parties to a treaty may not have lived up to its obligations. The other party then has the option of continuing to consider the terms valid or of declaring the treaty null and void.

Postal treaties are now made by the Postmaster General subject to the approval of the President. This is true even of a treaty changing the postal rate. These treaties are not submitted to the Senate for approval. One was so submitted in 1844 and approved. Thereupon Congress passed an act authorizing specifically the Postmaster General to negotiate such treaties subject to the approval of the President. Congress also has authorized the President to negotiate copyright and trade-mark conventions.

The President sometimes makes executive agreements without referring them to the Senate. The Rush-Bagot agreement on the limitation of armaments on the Great Lakes is one of the earliest examples. The agreement was effected by an exchange of notes in 1817. A few months later the President submitted the pact to the Senate and that body promptly gave its approval. Several agreements of this kind were made with Mexico in the 1880's providing for a reciprocal right to cross the boundary in unpopulated places to pursue persons, as, for instance, Indians, who had committed predatory acts. Agreements of this kind may be justified by the Constitutional power of the President as commander in chief of the army and navy.

Other executive agreements may rest on his power to direct diplomatic affairs. The exchange of notes which John Hay negotiated on the Open Door in China may be given as an example. Another would be the Gentlemen's Agreement with Japan, 1908, reached by an exchange of notes between Secretary Root and Ambassador Takahira, by which the United States left the enforcement of its immigration law, so far as the Japanese were concerned, to Japanese officials. This agreement could have been canceled by executive notice at any time. As a matter of fact, it was superseded by the total exclusion of Japanese immigrants in the immigration law of 1924.

Various modus vivendi have been entered into at different times. For example, President Theodore Roosevelt initiated control over the finances of the Dominican Republic by means of an executive agreement in 1905.

Executive Powers

The Constitution states that "The executive Power shall be vested in a President of the United States of America" (Article II, Section 1). Among his duties is the injunction that "he shall take Care that the Laws be faithfully executed. . . . " (Article II, Section 3).

At the time of his inauguration, the President must take the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability preserve, protect and defend the Constitution of the United States" (Article II, Section 1).

The Constitution stipulates further that the President is to be commander in chief of the army and of the navy. He may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices. Subject to the advice and consent of the Senate, he has a large power of appointment, but Congress may by law vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of the departments. The power of removal is not expressly mentioned but he does have the power to fill vacancies that may happen during the recess of the Senate by granting commissions which expire at the end of the next session.

Appointments

Bound up with the execution of the law are appointments and removals of officers. The Constitution mentions officers and inferior officers. Officers of the United States may be described as those who have been nominated by the President and have had the nomination confirmed by the Senate. It is now quite well established that inferior officers are those who do not require any formal action on the part of the Senate. They are appointed by

the President alone, such as the officers on the staff in the White House, or by the cabinet officers, such as subordinate officials in their departments, or by judges of courts, such as clerks or referees in bankruptcy.

Members of Congress may suggest to the President desirable persons for official positions but probably Congress may not through legislation designate a person to fill a particular post. Congress did at one time pass an act designating an individual to become a colonel in the regular army. President Arthur vetoed the bill on the ground that it encroached upon the President's appointing power. When Grant lay dying, Congress passed an act providing that the President should appoint from among the living generals one to be placed on the retired list with full pay. Grant's name was not mentioned, but public sentiment and the intent of Congress were unmistakable. The President appointed Grant.

Senatorial courtesy has sprung up in the Senate in connection with appointments. If the President desires to appoint a person from a particular state to a position and one or both of the Senators from that state belong to the same party as the President, the practice has developed for the President to ask the senior Senator belonging to his party if there is any objection to the appointment. Should the President neglect to do so, the Senator will object and by courtesy the Senate usually will refuse to act favorably upon the President's nomination.

Removals

Inasmuch as removals were not specifically mentioned in the Constitution, that subject came up for debate in the first Congress. James Madison in the House took a leading part and a majority agreed with him that the President had the independent and complete power of removal as a corollary to the power of appointment. In the Senate the proposition met with a tie vote which Vice-President Adams resolved by voting affirmatively.

The Tenure of Office Act of 1867 was intended to curb President Andrew Johnson. The law provided that while the Senate was in session the President could remove no officer without its consent and while the Senate was not in session he could merely suspend, if the officer was guilty of crime or incapable of performing his duties; and that within twenty days after the opening of the next session the President should inform the Senate as to the evidence and reasons for the suspension. If the Senate should refuse to concur in the suspension, the officer should resume his functions. If the Senate did concur in the removal, that body would certify this fact to the President who would thereupon make the removal and would appoint another by and with the advice and consent of the Senate. It was under this statute that President Johnson was impeached by the House for the removal of Stanton as Secretary of War and narrowly escaped conviction by a two-thirds majority of the Senate because Senator Ross of Kansas decided to vote "not guilty." The Tenure of Office Act was speedily modified in Grant's administration and was completely repealed in the latter part of 1886

The President appears to have complete power of removal in the case of purely administrative officers. The leading case dealing with the removal of an administrative officer is Myers v. United States. Myers had been appointed postmaster of Portland, Oregon, for a term of four years by President Wilson in 1917. The President demanded his resignation on January 20, 1920, but Myers refused to comply. On February 2, 1920, the Postmaster General, acting by direction of the President, ordered the removal of Myers. Myers insisted that he had the right to the office and made no effort to obtain other employment. In August the President appointed a successor. Myers insisted that his removal was unlawful in that it conflicted with the law under which he held office. The section on which he based his claims reads: "Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law."

Myers prosecuted the case in the Court of Claims. The decision was against him. He appealed to the Supreme Court. Before that court could render a decision he died and Mrs. Myers succeeded him in the claim. Chief Justice Taft delivered the opinion and it had particular weight because he had served

as President. The Court upheld the President's complete power of removal. The pertinent part of the decision reads: "When, on the merits, we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so." The Court, therefore, held unconstitutional the provisions of the law of 1876 restricting the President's power to remove first class postmasters.

It is to be noted that the Myers case involved an administrative officer. For some time there was doubt whether the member of a quasi-judicial tribunal such as the Federal Trade Commission was similarly subject to the Presidential removal power. In 1935, this problem was brought before the Supreme Court. The members of this Commission had been made subject to removal by the President for "inefficiency, neglect of duty, or malfeasance in office." Humphrey, a member of the Commission, was removed by President Franklin D. Roosevelt, without mentioning any of the charges enumerated in the act as grounds for removal. Correspondence with Humphrey showed that the basis was that the purposes of the Administration with respect to the work of the Commission could be carried out most effectively with personnel of the President's own selection, and that the President did not feel that "your mind and my mind go along together" with respect to the policies and administration of the Commission.

In this case the Court made a distinction between executive officers, such as postmasters, and officers, such as members of the Federal Trade Commission, who carry out legislative policies and perform duties of a judicial nature. The latter are not arms of the executive. The Court held that as to members of the Commission, they could not be removed by the President except for one of the causes named in the law. At the same time, the Court was careful to limit its opinion to the circumstances of this particular case, pointing out that between the unrestricted power of

removal as applied to purely executive officers, as in the Myers case, and the limitation upon that power involved in the present case, there was a field of doubt which could be left for determination under the special circumstances of such future cases as might arise (Humphrey's Executor v. United States).

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CHAPTER IX

The Cabinet and the Departments

The Cahanet

The Constitution makes no provision for a cabinet. It exists only by custom and the will of successive Presidents. It is true that Congress makes provision for the heads of departments and appropriates money for their salaries; but it requires Presidential action to bring these heads of departments together around the council table and thus constitute a cabinet.

Immediately after the organization of the government under the Constitution, the question arose of having the heads of departments appear before the House of Representatives and present their views. Hamilton as Secretary of the Treasury wanted to appear before the House and present his celebrated report on public credit. The House, however, refused to invite him. Later some members of the House desired to have Hamilton and the Secretary of War, Henry Knox, appear before the House, but they were unable to make their wishes prevail upon the other members. The result was that the President, instead of the lower chamber, as in Great Britain, became the coordinating agency for the department heads.

Congress having adjourned in March, 1791, and President Washington having gone to Mount Vernon, he wrote a letter on April 4, asking the Secretaries of the Departments of State, Treasury, and War to consider any serious and important cases that might arise during his absence, and he wished the Vice-President, John Adams, included, if he had not already left for Boston. These three and the Vice-President did meet on April 11, 1791, and considered a number of problems confronting the country. Jefferson made a careful report to Washington. H. B. Learned, in his study, *The President's Cabinet*, considers this the

first meeting of the cabinet. Later, the Attorney General, Edmund Randolph, was included, although the Vice-President appears not to have been invited again during this period. The meetings of the heads of the departments with the President became frequent. The term "cabinet" to describe this meeting of advisers came into use later—By the time of Andrew Jackson it probably had gained general acceptance, but it was not until 1907 that the word appeared in a federal statute.

Nowhere does the Constitution make provision for a cabinet. That document states that "he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices. . . ." (Article II, Section 2). Instead of asking for the opinion in writing the President calls a meeting of the heads of the executive departments twice a week so that he may submit to them questions upon which he may want their deliberation and advice and so that the members may bring up matters that pertain to other departments or that are of national importance. President Lincoln is said to have remarked that in a cabinet meeting there were many arguments and opinions but only one vote—and that was the vote of the President.

It has been proposed that cabinet officers be permitted to have the privilege of the floor in either house of Congress. It would require an amendment to the Constitution to give them seats in either house. This might radically change our system of government. The cabinet officers might tend to become responsible to the lower house as is the case with ministers in the governments of Europe. However, the privilege of the floor could be granted by a resolution of each house. This would enable a cabinet member to present arguments in behalf of measures which he deemed desirable in connection with his department. Presumably he would be the best informed man on that particular measure. The members of Congress and the country at large would benefit by this expression of opinion. Such a practice would no doubt compel the President to change the character of his choice of men to fill cabinet positions. He would be likely to choose his heads of departments from among leading

Senators and Representatives or from among former members of Congress who knew its methods of procedure instead of from among men of affairs as is the case at present. In such case, however, under our Constitution the Senator or Representative would have to resign his seat in Congress.

There are few statutory qualifications for the heads of departments. The main ones are found in connection with the Secretary of the Treasury; they will be described later. The President is given a free hand in the choice of his cabinet members. The Senate approves his choice usually as a matter of course, holding that the President is entitled to have men sympathetic and loyal to him and holding also that the President assumes responsibility for his selections. As a rule the President chooses his cabinet members from within his political party. Not always are they his personal friends; but he picks persons that he thinks will cooperate with him. He has due regard for geographical distribution and he keeps in mind the need that the person designated will command the confidence of the vast interests involved in the particular department.

Cabinet officers are responsible to the President. He may dismiss them at any time. They may be censured by either or both houses of Congress, but whether this is effective depends upon the attitude of the President. Impeachment charges may be preferred against them. This has been sufficient to bring about the resignation of one cabinet officer, Secretary Belknap, in Grant's administration.

In connection with the succession to the Presidency, the cabinet serves an inert function. The old succession law provided that when the President died or became disqualified, he would be succeeded by the Vice-President, he in turn by the President of the Senate and, if necessary, by the Speaker of the House. It so happened that when Garfield was shot in 1881 and Arthur succeeded to the Presidency there was no President of the Senate and, the House of the new Congress not having been convened, there was no Speaker. On November 25, 1885, Vice-President Hendricks died. At this time Senator George F. Hoar pressed again for consideration of his bill, first introduced in 1882, pro-

viding that, after the Vice-President, the order of succession should follow the members of the cabinet in their order. In 1886, Congress passed this bill.

Department of State

The Department of State is the country's first line of defense. Its victories are those of peace and therefore usually unheralded. The army and navy may give potential assistance; however, it is only when the Department of State meets defeat that the army and navy are called into action. After the war is over the Department of State makes peace and contends with the resulting problems of foreign affairs.

Foreign affairs have always been of such importance in our history that the Presidents have designated men of commanding ability as Secretaries of State. Washington chose Jefferson. Jefferson in turn chose Madison. Monroe chose John Quincy Adams. Webster graced the position under two Presidents, Harrison and Fillmore. President Pierce chose William L. Marcy; Grant, Hamilton Fish; McKinley, John Hay; and Harding, Charles E. Hughes. A mention of the problems confronting Hughes will indicate the scope of the office.

He supervised the negotiations of the final treaty of peace with Germany, the negotiation of a new commercial treaty and of the treaty on claims. He fought for the preservation of the rights of the United States in the mandated territories and in connection with reparations. He brought about the cooperation of the United States with the League of Nations upon humanitarian projects, such as the suppression of the opium traffic and white slave traffic, the promotion of health, the exchange of information on conditions of labor and on disarmament. An immense staff assisted him in the preparations for the Conference on the Limitation of Armaments and over this conference he presided. For the first time in the world's history armaments were actually limited. In connection with this conference many questions pertaining to the Far East came up.

The Monroe Doctrine had to be continuously interpreted to

^{*} See p. 136

Latin America. A conference of Central American republics was called in order to smooth out differences. The property rights of Americans in Mexico, especially the subsoil rights in minerals, had to be protected. He represented the United States at the celebration of the centennial anniversary of Brazilian independence in 1922. Chile and Peni had submitted the Tacna-Arica dispute to President Harding for arbitration. Obviously, the duty of preparing the opinion fell to the charge of Secretary Hughes.

Relations with Russia had to be clarified for people at home and abroad. The treaty with Turkey was negotiated at Lausanne for the renunciation of the capitulations. The Immigration Act of 1924 raised a number of thorny diplomatic problems with Japan. The Eighteenth Amendment virtually compelled the negotiation of a number of treaties to prevent the smuggling of intoxicating liquors into the United States

Mr. Hughes' speech to the American Historical Association paved the way for a conference in London which he attended and which resulted in the Dawes plan. He spent a good deal of time and effort in connection with the proposed adherence of the United States to the Permanent Court of International Justice.

Aside from these larger problems, many courtesies of a social nature had daily to be extended in order to facilitate negotiations. Events that loomed large in the minds of foreign envoys needed to be observed and in many instances speeches had to be carefully prepared. If a celebration marked the anniversary of a famous battle or the birthday of the head of a state, he participated. If a funeral, a memorial service, or a marriage within the diplomatic corps took place, he pushed aside his unfinished work and attended. The Secretary of State cannot attend to even these smaller duties in a perfunctory way; at all times he is the representative of the United States.

The Department of State formerly published, and was the custodian of, all statutes, treaties, proclamations, and executive orders. At present, executive orders and most proclamations are published by the National Archives, which also has custody of these as well as of all except the recent statutes.

The State Department edits the official foreign correspondence

of the United States. It grants passports to United States citizens and visas the passports issued by foreign countries. The Secretary of State is the keeper of the Great Seal of the United States and he affixes it to commissions, treaties, and other important papers. Questions of the personal and property rights of aliens in the United States and of American citizens in foreign countries are investigated by the Solicitor of the Department of State; as are questions related to naturalization, extradition, extraterritoriality, and the rights of foreign diplomats and consuls in the United States and of American diplomats and consuls abroad.

The foreign service falls under the supervision of the Department of State. The Department is organized largely on the basis of geographical divisions, such as the Far East, Latin American Affairs, Western European Affairs. The foreign service comprises the diplomatic and consular services. In order to enter, a person must pass a written civil service examination and also an oral and physical examination. Scholarship weighs heavily in the first; health, personality, and adaptability, in the latter. The successful candidates are not appointed permanently to any particular post. And the President is free to transfer them from the diplomatic to the consular branch or vice versa. In general, those who enter the service as a profession are more and more filling the higher grades. In the consular service the positions are filled almost without exception from the career men. This practice puts the foreign service on a professional basis similar to that of the army and navy.

Diplomats are of four grades. Highest in rank are the ambassadors. They are accredited to states having important relations with the United States, as Cuba, Japan, France. Ministers rank next. They have much the same powers as ambassadors but have access to the Secretary of Foreign Affairs of the country to which they are accredited rather than to the sovereign. This may be an embarrassment, as is illustrated by difficulties experienced by our minister in Turkey. When Sultan Abdul Hamud II was on the throne, the American minister could obtain only unsatisfactory replies from the minister of foreign affairs who would close the interview by saying that the matter would have

to await the pleasure of His Imperial Majesty, the Sultan. Since a minister did not have the privilege of claiming an audience with the head of the state, our Department of State asked if it would be agreeable to the Sultan to exchange ambassadors. He consented. The mission to Turkey has held the grade of embassy to the present time. Ministers are generally sent to the countries of lesser importance.

A chargé d'affaires takes control during the temporary absence of the chief of the mission. A chargé d'affaires ad interim is an official who is temporarily head of the mission pending the appointment of a minister or ambassador to that particular post. Ministers resident are sent to minor states, as Liberia, and the grade may have coupled with it that of consul-general.

The document which a diplomat carries to show his authority is a letter of credence furnished by his home government. Personal representatives of the President, such as Colonel House for President Wilson, are executive agents. They may wield more influence than an accredited diplomat but they carry no official credentials.

The duties of a diplomat fall under five heads: (1) Ceremonial. This includes the proper presentation of the letter of credence, making calls, attending formalities in connection with state marriages, funerals, or coronations. (2) Negotiations. This power includes the reaching of informal understandings and agreements. Extradition and looking after the treaty rights of Americans would come under this head. If the diplomat should be asked to negotiate a new treaty, a special full power for this purpose would be necessary. (3) Observation. For this purpose the head of the mission has numerous assistants, such as military, naval, commercial, and agricultural attachés. (4) Guardianship of his countrymen sojourning in the state to which the diplomat is accredited. Whenever their rights under a treaty or under international law are brought into question, he makes the proper representations to the foreign office. (5) Pleading his country's cause. He presents the policies and actions of his country in the most favorable light. Usually he does this in as impersonal and as indirect a way as possible. Benjamin Franklin was notably successful in this regard.

In order that he may execute his functions as the representative of a sovereign state he is given complete immunity from local jurisdiction. He, his family, and his official suite cannot be arrested for crime or for the nonpayment of debts, although in both cases they ordinarily observe the law scrupulously. The legation or embassy may not be invaded by the police. In turn, some restrictions have come to be required upon modes of procedure. The diplomat may not appeal directly to the country through the press. He may not take part in political campaigns. His official contact is with the foreign office.

Consuls do not enjoy as many immunities as diplomats. The consulate may not be invaded. The records are immune. The consul is, however, liable to arrest for serious crimes. He may be subpoenaed as a witness but he may not be compelled to bring official documents with him.

The duties of a consul are numerous. The privilege of exercising his official duties comes from the foreign office of the country in which he is located. The document for the purpose is called an exequatur. This exequatur may be revoked at any time for any purpose that the government sees fit. Our consuls report to the Department of State on the condition of the markets in the district in which they are located. Any shortage of crops or any change in tariffs or customs regulations must be reported promptly. They assist in the collection of income taxes from Americans residing abroad, certify to the correctness of the evaluation of dutiable merchandise, and enforce the quota allotments for immigrants who want to come to the United States. Vessels coming from American ports submit to our consul the requisite documents as to passengers, cargo, and crew. Consuls may settle disputes between master and seaman on American vessels. They visa the passports of foreigners coming to the United States, and may administer oaths, take depositions, and act as witnesses to marriages. In a few countries the consul may exercise the powers of a court, as in China. This is called extraterritorial jurisdiction. This right is always based upon a treaty agreement. Thus, in China an American in a sense carries American law with him. The world over, the consul acts as a friend to the American citizen abroad.

The Secretary of State serves as chairman of the governing board of the Pan American Union. The diplomatic representatives in Washington of all the Latin American governments serve with him on this board. The members may elect any one of their number as chairman, but as a matter of courtesy they elect the Secretary of State.

The Pan American Union was founded in 1890 by the First Pan American Conference, meeting in Washington and presided over by James G. Blaine. Andrew Carnegie contributed nearly a million dollars to the building and grounds. Each member state contributes a quota to its support.

The board elects the director general and the assistant director. A considerable staff assists in furnishing information for the promotion of commerce, acquaintance, exchange of professors, and cooperation. The staff assists in preparing the programs for the Pan American Conferences. They pass resolutions, furnish a dignified setting for exchange of criticism, and promote understanding and good will.

The library, known as the Columbus Memorial Library, serves as custodian of the archives of the conferences. It is particularly rich in maps, files of leading Latin American newspapers, and documents.

The Treasury Department

The Secretary of the Treasury may not be directly or indirectly interested in carrying on a business of trade or commerce, or be an owner of a merchant vessel in whole or in part, or acquire public lands. This qualification is intended to place him above suspicion. He superintends the collection of the revenue, signs warrants for the issuance of money in accordance with appropriations made under law, and makes reports and gives information to either branch of Congress whenever called upon. The department has charge of the issuance of both hard and paper money. The Supervising Architect is in this department.

The Coast Guard comes under the supervision of the Treasury Department. A school at New London is maintained for the training of the personnel. The long coast of the United States and the increasing foreign business make the duties of the Coast

Guard highly important. The tariff act of 1922 increased the territorial waters of the United States from three to twelve miles out to sea from the low water mark for the purpose of detecting acts to evade or defaud the customs officers.

The vessel boarded and searched by the Coast Guard need not be bound for an American port. If a master of a vessel from a foreign port permits merchandise to be unloaded or received within twelve miles of the coast and before the vessel has come to the proper place for discharging cargo, he is liable to a penalty of twice the value of the merchandise and the vessel itself is rendered subject to seizure and forfeiture.

The Public Health Service of the Treasury Department² cooperates with the health section of the League of Nations at Geneva, the International Office of Public Hygiene at Paris, and the Pan American Sanitary Bureau at Washington in the collection and dissemination of information pertaining to the outbreak and prevalence of communicable diseases. This enables the United States to protect its ports of entry. Upwards of 25,000 vessels and 3,000,000 persons are inspected by quarantine officers each year. Passengers embarking at foreign ports for the United States are inspected before they are permitted to go on board; in many instances they are vaccinated and deloused.

Closely related to the Public Health Service is the Bureau of Narcotics. This bureau permits importations of such amounts of crude opium and coca leaves as may be necessary for medical and scientific purposes. It may also authorize exportation of narcotic drugs. All other importation or exportation is forbidden and made punishable as a criminal offense. The bureau is authorized to make regulations for trade in narcotics.

Information is obtained from other countries on imports and exports of opium and its derivatives and on what laws have been passed to regulate the trade and to curb the misuse of opium. The government of the United States has taken a leading part in bringing the international phases of the opium traffic under control. Fifty powers have agreed to cooperate. Certain it is, great progress has been made since Warren Hastings of the East India Company in 1783 declared opium "a pernicious article of luxury

² See p 755.

which ought not to be permitted but for the purpose of foreign commerce only."

The Bureau of the Budget is in the Department of the Treasury but under the immediate direction of the President. Its organization and functions are discussed elsewhere.³

Department of War

In view of the knowledge and skill required today in the profession of arms and considering the world as it is, the United States needs an army of trained men large enough to be an effective working nucleus around which large armies can be swiftly built in an emergency. A peace-loving people may be forced into war. Clausewitz pointed out long ago in his treatise on war that war is only one phase of the whole process of international intercourse and therefore cannot be considered alone.

The Secretary of War is charged with matters relating to national defense, particularly as listed in the National Defense Act of June 3, 1916, as amended June 4, 1920. He has charge of the defense and operation of the Panama Canal. The military academy at West Point falls under his control.

The General Staff prepares plans for mobilizing, supplying, and training the army for national defense. These plans may include the mobilization of the entire manhood of the nation. The General Staff keeps informed upon matters within the various field services, such as the cavalry, coast artillery, field artillery, and infantry, and thus constitutes a coordinating body.

The War Department performs many peacetime services. In case of storm or disaster, such as a hurricane in Florida or a flood in the Mississippi Valley, the army furnishes food, tents, and medicines almost instantly and at a time when relief will do the most good.

A network of intracoastal waterways, first recommended by Alexander Hamilton, is under construction. Terminal facilities are being provided to connect with the railways, thus affording cheaper transportation in time of peace and a potential asset in time of war.

³ See p 243.

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The corps of engineers does much peacetime work in improving rivers and harbors, and carrying out other construction projects.⁴ It even has charge of the preservation of Niagara Falls.

Formerly the Bureau of Insular Affairs was the central agency for the supervision of most of our larger island possessions but at present it has jurisdiction only over the Philippines, in so far as the United States government retains political interests there. The Panama Canal Office supervises the administration of the Canal Zone. Other possessions report through the Navy Department or the Interior Department

The Veterans' Administration is an independent agency but its duties are so closely related to the War Department that it deserves discussion here. By an act of Congress, July 3, 1930, and an executive order of July 21, 1930, the old Bureau of Pensions, the United States Veterans' Bureau, and the National Home for Disabled Volunteer Soldiers were consolidated into the Veterans' Administration.

Department of Justice

The Attorney General is the head of the Department of Justice. He gives legal advice to the President and to the department heads. His opinions serve as the basis for a mass of administrative law and they are considered with great respect by the courts. His subordinate, the Solicitor General, is specially charged with the duty of representing the United States as counsel in the Supreme Court but may also be required by the Attorney General to conduct cases for the government in lower federal courts or even in state courts. There are a number of assistant attorneys general, each charged with special classes of cases, such as anti-trust cases, claims for and against the government, land cases, criminal cases, customs cases, or other tax cases.

The Bureau of Prisons has very important duties in the treatment of prisoners and in crime prevention. Related to the work of this bureau is the Board of Parole and the Board of Pardons. The Federal Bureau of Investigation has received much attention of late, for it has been active and successful in the pursuit of

^{*} See p 700.

notorious criminals who have violated federal laws. This bureau has effectively filled the need for a central agency to cooperate with the states in crime prevention.⁵

Post Office Department

The Post Office Department, presided over by the Postmaster General, carries and delivers mail with promptness and exactness for the largest corporations in San Francisco or New York and for the humblest citizens in the states or in such far-off territories as Alaska, Guam, and Puerto Rico. City and rural carriers reach every household or office door within Uncle Sam's domains. Possibly no other governmental service is of greater social and economic value.

The United States is one of the few countries in the world that imposes a postal charge hardly sufficient to pay for the service rendered. Most other countries expect the post office to turn a handsome surplus into the national treasury.

Besides the regular mail service the post office carries parcels and conducts a postal savings bank with guaranty of deposits. Mail may be registered and insured, and articles may be sent collect-on-delivery. A large money-order business is transacted.

Through the mails the government exercises a benevolent check upon fraudulent business enterprises. Numbers of corporations or individuals each year are barred from using the mails because they sell worthless stocks or articles. The sale of nostrums and alleged curative devices, designed to prey upon the aged, sick, infirm, and dying, may thus be barred from the mails. In such cases complaint may be filed with the Postmaster General and when the evidence appears satisfactory to him he may issue a fraud order against the company, which means that all mail addressed to it will be returned to the sender. The postmaster does not open the letters.

The law prescribes that lotteries may not be conducted through the mails. The Post Office Department must therefore sift annually many schemes for offering prizes and determine whether they come within the scope of the term "lottery." Foreign lot-

⁵ See p 766

tery agents send quantities of their literature through the mails. If detected, the post office stops delivery and refuses to issue money orders for such agents. Obscene and scurrilous matter is barred from the mails and penalties provided for those who violate the law. Newspapers and magazines carrying seditious articles may also be barred.

The exercise of this power to issue administrative orders to exclude matter from the mails means that the Postmaster General has the power to destroy a person's business without a hearing before a court except upon matters of law or where the decision upon the facts has been arbitrary or discriminatory.⁶

Department of the Navy

In time of war the Navy becomes the first line of defense. And sometimes to assume the offensive is the best kind of defense. The first object of the Navy is therefore to maintain battle efficiency.

The Secretary of the Navy, a civilian, is at the head of the department. He is the coordinating officer for the various offices and bureaus. He irons out differences with the other departments and is the spokesman for the Navy. At present there is no Admiral of the Navy. The ranking naval officer with the title of admiral is the Chief of Naval Operations. He is charged with the operations of the fleet and with the preparation of plans for its use in war. The operations of the Marine Corps are under his control except when it is cooperating with the army or on other detached duty by order of the President.

The chief of the Bureau of Navigation has charge of the procurement, training, and administration of the officers and enlisted personnel of the navy. The Naval Academy comes under his supervision. So does the Naval Observatory, which sets the official time for the United States. The Hydrographic Office in this bureau makes surveys in foreign waters and on the high seas. It prepares sailing directions for vessels at sea and for airplanes.

The Department of the Navy maintains extensive bureaus for

⁶ See pp. 619, 750.

yards and docks, ordnance, construction and repair, engineering, medicine and surgery, and aeronautics.

A number of our island possessions are under the jurisdiction of the Department of the Navy. They are American Samoa, Guam, Wake Island, the two Midway Islands and the neighboring Ocean Island (the island of Kure), and a number of reefs.

While the first duty of the Department of the Navy is to maintain battle efficiency, it also serves to protect and promote American interests the world over. Marines and bluejackets have policed elections in Nicaragua upon the invitation of the government there. They have repeatedly protected American life and property in China. Officers of the Navy and of the Marine Corps have had a large share in the reestablishment of law and order in Haiti and the Dominican Republic. Commodore Perry assisted in the establishment of Liberia and he opened Japan to Western commerce and civilization. Thus, like the army, the navy performs services in time of peace as well as in time of war.

Department of the Interior

The Department of the Interior is largely concerned with conservation of natural resources.

The General Land Office has charge of the public lands These are now located in arid or semiarid regions. The term "public lands" does not include such publicly owned areas as national forests, national parks, and national monuments. It has reference to lands originally intended for entry under the homestead laws by private persons.

The Office of Indian Affairs is concerned with all matters relating to the Indians, including economic development, education, health, land use and sales, and roads in Indian lands.

The Geological Survey classifies public lands and studies the geology and mineral resources of the country.⁷ The National Park Service administers the national park system.⁸ The Bureau of Mines investigates mining methods, particularly with a

⁷ See p 699

⁸ See p. 689.

view to safety.9 The Bureau of Reclamation plans and constructs dams and irrigation works and administers the irrigation projects when completed.¹⁰ The Office of Education collects statistics, acts as a national clearinghouse upon educational information, and has some administrative functions in relation to educational grants-in-aid.11

The territorial governments of Alaska, Hawaii, Puerto Rico, and the Virgin Islands are under the general supervision of the Division of Territories and Island Possessions. This Division also has jurisdiction over a number of smaller islands.

Some years ago it appeared that the Department of the Interior was gradually losing its importance through the completion of much of the work for which it had been organized or through the absorption of functions by other departments. Recently it has gained greatly through the assignment to it of new responsibilities, such as the administration of a public works program, the performance of functions under the Connally Oil Act, and the administration of the Petroleum Conservation Division, the National Bituminous Coal Commission, 12 and the Division of Territories and Island Possessions.

Department of Agriculture

The Department of Agriculture is operated primarily for the agricultural industry, although the remainder of the population may benefit indirectly from its activities. It has gone through a greater expansion than any other department. Much of its activity in the past has been in the form of research leading to the production of better crops, higher grades of livestock, and the reduction of production costs. The Department has not stopped with this, however, but has concerned itself with the whole problem of farm life, giving the farmer instruction in the building, maintenance, and even beautification of his home. This work has been carried on, not under direct powers in relation to agricul-

⁹ See p 699 ¹⁰ See p 701

¹¹ See p 735 ¹² See pp 696, 698

ture, but primarily through the federal power to appropriate and spend money.¹³

More recently the Department has been involved in a campaign to raise prices of farm products and to control surpluses.¹⁴

A large part of the regular expenditures of this Department is for roads. The Bureau of Public Roads is the agency through which the Department works for this purpose. ¹⁵ The Bureau of Agricultural Economics conducts studies in the economics of farm marketing, farm financing, and related matters, and a number of other bureaus, such as the Bureau of Animal Industry, 16 perform functions closely related to farming. The work of the Department through the land grant colleges and experiment stations is in large part primarily of benefit to farmers.¹⁷ Other bureaus, such as the Bureau of Biological Survey, primarily concerned with wild life conservation, 18 the Food and Drug Administration, concerned with the interstate shipment of harmful drugs and adulterated or impure foods, 19 the Forest Service, concerned with the administration of the national forests,20 the Bureau of Home Economics, concerned with various problems relating to the home, and the Weather Bureau, forecasting weather conditions, perform functions which may concern other groups as much as they do the farmers.

A number of bureaus have been created to meet emergency distress among the farmers and some of them may remain permanently. These bureaus are discussed in their relation to agricultural aid.²¹

Department of Commerce

The Department of Commerce is the chief agency for the promotion of the commerce of the United States. It looks after the lighthouses, makes coastal surveys, inspects the vessels, and sees

¹³ See p 231

¹⁴ See p 721.

¹⁵ See p 739

¹⁶ See pp 751, 755.

¹⁷ See p 711

¹⁸ See p 690

¹⁹ See pp 713, 749

²⁰ See p 688

²¹ See p 710

to it that provisions for the safety of crew, cargo, and passengers are made.²² Probably the safest place in the world is on board a ship at sea. On the ocean and coastwise vessels of the United States only one out of every five million passengers carried loses his life.

For a period it exercised powers in relation to air commerce, but these have now been transferred to a separate agency.²³

The Bureau of the Census furnishes the information for the apportionment of Representatives. It takes a census of population every ten years and a census of manufactures every two years. Various other types of statistics are collected, including vital statistics and financial statistics of cities.

The National Bureau of Standards is the great testing and measuring establishment of the government. By means of its work, production has been stimulated and waste curtailed. The metric system as well as the English system of weights and measures is authorized by law. Slowly the superior metric system is overcoming the inertia of the people.

The Bureau of Foreign and Domestic Commerce is the chief agency for the promotion of our commerce as contrasted with the regulatory functions of such bodies as the Federal Trade Commission. It makes studies in aid of the businessman upon such matters as marketing methods. Its district offices within the United States disseminate information and supply advice to our businessmen and its foreign offices endeavor to stimulate our foreign trade by furnishing information to our businessmen upon trade opportunities abroad and by bringing them into contact with foreign purchasers or exporters. The reports from these foreign offices keep our businessmen informed upon economic and trade conditions abroad.

One of the most interesting activities of the Department of Commerce is to care for the fur-seal herd on the Pribilof Islands in the Bering Sea. The Bureau of Fisheries does a great deal to protect and to promote the fish resources of the country. It studies methods of fish culture and of marketing.²⁴

²² See pp 601, 602.

²³ See p 602 ²⁴ See p. 691

In the Department of Commerce also is the Patent Office, which grants patents for inventions and registers trade-marks. The registration of copyrights to books, periodicals, photographs, and motion pictures is not under the jurisdiction of the Patent Office, but is carried out in the Copyright Office in the Library of Congress.

Department of Labor

The act of Congress creating the Department of Labor specifies that it shall foster, promote and develop the welfare of the wage earners of the United States, improve their working conditions, and advance their opportunities for profitable employment. Accordingly the Department collects labor statistics, seeks to solve questions of unemployment, enforces the immigration laws, and, together with the courts, administers the naturalization laws and conducts investigations pertaining to the welfare of children and of women.

The agency within the Department for the administration of the naturalization and immigration laws²⁵ is the Immigration and Naturalization Service, under the Commissioner of Immigration and Naturalization.

The Women's Bureau of the Department of Labor makes studies in the status of wage-earning women, with a view to improving their working conditions and advancing their opportunities for employment. The Children's Bureau makes studies in relation to the welfare of children, including infant mortality, delinquency, and child labor. It administers funds under the Social Security Act for maternal and child health, crippled children, and child welfare.

In this Department are the United States Conciliation Service, which attempts to bring about the peaceful settlement of labor disputes in industry,²⁶ the Bureau of Labor Statistics, which collects information on subjects connected with labor, such as employment, earnings, and industrial disputes, and the United States Employment Service, which has developed a national system of employment offices. This latter Service has important duties to

²⁵ See p 209.

²⁶ See p 660.

perform in relation to unemployment compensation under the Social Security Act.

Independent Establishments

In addition to the ten departments there are a considerable number of independent offices and establishments, set up to perform particular functions. The work of most of these is discussed elsewhere. Important independent establishments are: the General Accounting Office, the Interstate Commerce Commission, the Board of Governors of the Federal Reserve System, the Federal Trade Commission, the United States Tariff Commission, the United States Board of Tax Appeals, the Federal Power Commission, the National Mediation Board, the Reconstruction Finance Corporation, the Federal Home Loan Bank Board, the Tennessee Valley Authority, the Electric Home and Farm Authority, the Rural Electrification Administration, the Farm Credit Administration, the Federal Emergency Administration of Public Works, the Works Progress Administration, the Civilian Conservation Corps, the Federal Deposit Insurance Corporation, the Commodity Credit Corporation, the Securities and Exchange Commission, the National Resources Committee, the National Labor Relations Board, the Railroad Retirement Board, the Federal Communications Commission, the Social Security Board, and the United States Maritime Commission.

Government Reorganization

The mere enumeration of the independent establishments in this incomplete list would seem to indicate that there are too many bodies independent of the regular departments. Most of them are of comparatively recent growth, having been established subsequent to the creation of the Civil Service Commission in 1883 and the Interstate Commerce Commission in 1887.

In 1910, under President Taft, a commission was appointed for the purpose of studying the organization of the federal administrative system. It had in view not only the problem of the independent establishments and duplications and overlapping of functions in the departments, but also fiscal organization and other matters affecting the efficiency of the government services. The commission rendered a report but this led to no results except to keep the question of reorganization before the public. Other investigations and reports have been made since that time but no general reorganization of the government services has actually been brought about.

Two independent reports upon government reorganization were made during 1937. One of these was the report of the President's Committee on Administration Management, a committee which had been appointed by President Roosevelt for the purpose of studying and reporting upon the problem of reorganization. The other was a report made by the Institute for Government Research of the Brookings Institution, a research organization in Washington, D. C., which is devoted to the study of governmental and economic problems.

The President's Committee proposed radical changes in the governmental setup. Apparently the Committee proceeded upon the theory that the President is charged by the Constitution with the duty to "take care that the laws be faithfully executed," and in order that he may properly perform this function the various services must be grouped within the administrative departments. To this end the Committee proposed the addition of two departments, one a Department of Social Welfare and the other a Department of Public Works. The present Department of the Interior was to become the Department of Conservation. Within these twelve departments all the existing services were to be included. Some difficulty was encountered in dealing with the problem of the great quasi-judicial commissions, such as the Interstate Commerce Commission and the Federal Trade Commission. This was surmounted by the proposal to divide the work of the commissions into two sections, administrative and judicial. The administration section would be entirely within a department. It would take over the rule-making functions of the commission and would carry on all of the work of investigation and the prosecution of complaints. The judicial section would be limited to the purely judicial function of deciding cases. This section was to be within a department only for purposes of "administrative housekeeping," such as the preparation of the budget of the commission and the supervision of employees. Otherwise the judicial section

was to remain independent. It was argued by the President's Committee that this arrangement would obviate a criticism that it saw in the present arrangement under which the prosecution of a case and its trial are both under the control of the Commission, so that in a sense the Commission is both prosecutor and judge. Other recommendations of the President's Committee included the establishment of a central planning agency which would serve as a clearinghouse of ideas and information for the improvement of the national well-being and would serve as a coördinating agency for federal and state activities; the creation of not over six new assistants to the President who would form a link between him and the departments; the reorganization of the Civil Service; and the reorganization of the Comptroller General's Office. The two latter proposals are discussed elsewhere.²⁷

The proposals of the President's Committee met with considerable opposition from the beginning and this opposition grew with the passage of time. A large body of opinion was skeptical of the proposals concerning the quasi-judicial commissions. Many informed persons did not consider objectionable the inclusion of administrative and judicial duties within a commission, believing the procedure of the commissions was such that justice was fairly applied. On the other hand, they were convinced that the transfer of a judicial body to a department, even though only for "administration housekeeping," might easily lead to a destruction of judicial independence, since control of its budget may amount to control of the life of a body. The recommendations upon the Civil Service and the Comptroller General's Office also met with warm opposition. The fundamental idea that the President was primarily responsible for the work of the bureaus was not universally accepted, for in the past Congress had in fact exercised a supervision over the bureaus through its power to create them and define their functions and through its control over their budgets. It has even been held that Congress may give to an administrative officer powers which the President cannot control (Kendall v. United States).

Eventually bills were introduced in both houses of Congress embodying part of the proposals of the Committee, but none of

²⁷ See pp 491, 247

these was successful in passing more than a single house. A greatly modified reorganization plan passed the Senate but eventually was defeated in the House of Representatives. The vote in both instances was close. The defeat of reorganization was due to a growing fear that the plan as proposed by the President's Committee tended to place too much power in the hands of the President. It was upon this broad issue, rather than upon the relative merits and demerits of individual issues, that the reorganization plan failed.

At the same time that the report of the President's Committee was before the country, the Brookings Institution submitted the report which had been made for a special Senate committee under the chairmanship of Senator Byrd of Virginia. This report was the result of a careful factual study of the way in which the various functions of the federal administration are performed. It rejected the a priori approach, and based its recommendations in each instance upon a careful study of each subject of investigation. Its recommendations were of a more moderate nature than those of the President's Committee, constituting an effort to bring about improvements within the existing structure rather than to alter its entire basis. The attention of the country, however, was centered upon the more spectacular proposals of the President's Committee. These became identified in the public mind with the term "reorganization" and it is entirely likely that the result of the reorganization proposals of the President's Committee may be to set back the accomplishment of reforms upon which there is more general agreement among careful students.

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CHAPTER X

The Federal Courts

The Supreme Law of the Land

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This is a specific Constitutional provision (Article VI). Since, by this provision, the judges in the state courts must recognize and administer the provisions of the Constitution, federal laws and treaties, in cases that come before them, they are, in a sense, courts of the United States. Even though no federal courts existed, the law of the land would still be binding in cases before the state courts.

The Need of a System of Federal Courts

There are very practical reasons, however, why the United States must have a system of courts of its own. For one thing, criminal matters which involve a violation of federal laws cannot be left to the states, for the latter might not be willing to enforce such laws. It is difficult to see how a state could be compelled to provide police to enforce the criminal laws of the United States. Nor does there appear to be any Constitutional authority under which Congress could require state courts to try federal criminal cases. It is true that where a state court has jurisdiction over a case it must recognize the law of the land in taking action, but this is a different thing from a compulsion upon the state to give jurisdiction to its courts over federal crimes. Similarly, a state could not be compelled to take jurisdiction over other federal mat-

ters. For instance, it would appear that Congress could not compel state courts to take jurisdiction over federal patent cases or questions of federal land grants.

Another reason for establishing a system of federal courts is the necessity for a uniform interpretation of federal laws over the country as a whole. Forty-eight systems of state courts having possibly forty-eight differing interpretations of federal laws would cause much confusion. A federal law might be held to mean one thing in one state and another thing in another, while in still a third it might be held unconstitutional. Federal laws, uniform on their face, would in practical effect change with the crossing of each state line.

Federal courts are necessary for the further reason that state jealousy of the central government probably would lead to a narrow construction of the Constitution and federal laws so as to restrict their operation to as small a field as possible. Had there not been a system of federal courts with such men as John Marshall to give a broad construction to the powers of Congress, it is unlikely that the Constitution could have endured, for the central government would have been inadequate to solve the problems that had to be faced. During the early period under the Constitution, the danger of federal encroachment upon the states was not so serious as the possibility of a weak central government.

Federal courts also are necessary to decide disputes between states. For this purpose the courts of either of the parties to the dispute would be inadequate, for the courts of one state could not have jurisdiction over the other state. It is also highly desirable that disputes between states and citizens of other states and disputes between citizens of different states be settled in an independent system of courts rather than in the courts of one of the litigants.

The Organization of Federal Courts

The third article of the Constitution deals with the organization and powers of the federal judicial system. A single sentence comprises the provisions concerning organization. "The judicial Power of the United States, shall be vested in one supreme Court,

and in such inferior Courts as the Congress may from time to time ordain and establish."

It is mandatory upon Congress to carry out the provisions for a Supreme Court. The duty could not be evaded without a clear violation of a Constitutional duty. However, the Supreme Court is the only court that is specified in the Constitution.

It has been suggested that Congress must establish at least one court other than the Supreme Court. This suggestion is based on the idea that Congress must vest all the judicial power of the United States somewhere in federal courts, and since the Supreme Court has only a very limited original jurisdiction (right to try a case in the first place as distinguished from an appeal), the remainder of the original jurisdiction must be vested elsewhere in the federal court system. Therefore at least one inferior court would need to be established (Martin v. Hunter's Lessee). However, Congress controls the creation and the jurisdiction of the inferior courts and this would seem to involve the power to abolish them entirely. The original jurisdiction of the Supreme Court is limited to cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party, and therefore presumably all other cases could be confined by Congress to the state courts with no right of appeal to the Supreme Court. /As the matter now stands, Congress determines the number of inferior United States courts, fixes their jurisdiction, determines what cases may be settled finally by them or appealed, and also determines what cases may be appealed from state courts to the Supreme Court /

Judicial Independence

Recognizing the need for fearless and independent judges, the Constitution provides that they shall hold office during good behavior. They can be removed through the process of impeachment and it is commonly assumed that this is the only process by which they may be removed. However, on June 22, 1937, a bill was passed by the House of Representatives (although it did not become a law) which would have permitted the removal of district judges of the United States upon a trial before a specially constituted court of judges of the circuit courts of appeals. The

passage of the bill in the House was preceded by an interesting debate in which it was pointed out that while federal judges serve during "good behavior," the Constitution does not specify that the determination of what constitutes good behavior is to be left to the Senate in impeachment cases. Even though this bill had become law, judges would still have been removable through the usual process of impeachment and trial, since judges are civil officers of the United States and hence subject to that process of removal by specific Constitutional provision in Article II, Section 4.

The salaries of federal judges appointed under the third article of the Constitution cannot be reduced after appointment. Even the federal income tax cannot be levied upon their salaries, as this would constitute a reduction in violation of the constitutional provision (Miles v. Graham). Supreme Court, circuit, and district 3. judges may, at the age of seventy and after ten years service, resign their offices, and by law receive full pay. In this case, however, they cease to be judges and their pay is subject to reduction. Alternatively, they may retire on full salary, remaining subject to such assignment as the retired judge may undertake. Presumably their pay is not subject to reduction in this case, for they have not resigned. The latter privilege was not granted to Supreme Court judges until 1937. If a judge in a district court or circuit 4 court of appeals becomes disabled and refuses to resign or retire, the President may appoint an additional judge to his court who becomes his senior in rank.

Federal judges are appointed by the President with the advice and consent of the Senate. The provisions affecting appointment, tenure, and salary apply to all inferior courts as well as to the Supreme Court. They do not, however, apply to the courts of the territories, since such courts are set up under the power to govern the territories, not under the provisions of Article III (Balzac v. Porto Rico).

The state courts are, of course, set up under the state constitutions, most of which do not grant the protection enjoyed by the federal courts under Article III. Judges of the state courts usually are elected by the people for short terms, and they may be influenced by considerations of reelection. On the whole the

¹ See p 201

federal judiciary seems to be held in higher esteem than that of the states, although this may be due in part to other considerations than tenure and the method of selection.

Jurisdiction of Federal Courts

The jurisdiction of the federal courts is limited to two classes of cases. The first class includes those cases that present some federal question. A federal question is one that arises under the Constitution, laws, or treaties of the United States. A case that involves the constitutionality or the meaning of an act of Congress, or the legality of an action of the President or other federal officer presents a federal question. These cases, then, reach the federal courts because of their subject matter.

A second class of cases comes within the jurisdiction of the federal courts because of the nature of the parties to the suit. Suits in which the United States or a state is a party, or suits between the citizens of different states (diverse citizenship), or between citizens of a state and those of a foreign country, or suits in which foreign ambassadors, other public ministers or consuls are parties, fall within this class. In the case of Chisholm v. Georgia it was held that the clause giving to the federal courts jurisdiction over cases between a state and citizens of another state included cases brought by a citizen of one state against another state, but the Eleventh Amendment was immediately adopted to remove this jurisdiction. It was not thought proper that a "sovereign" state should be made a defendant by a citizen. There was never any doubt that a citizen was barred from suing his own state, except with its consent, since it is a general principle that no individual can sue his sovereign. This doctrine is so well accepted that it was not considered necessary to forbid such suits in the Eleventh Amendment. In Principality of Monaco v. Mississippi the Supreme Court held that it could not take jurisdiction of a suit by a foreign country against a state without the consent of the state. Therefore, the phrases "between a State and Citizens of another State" and "between a State . . . and foreign States, Citizens or Subjects" at the present time include only suits brought by the

state as plaintiff, unless the state voluntarily consents to be sued. The Constitution does not grant to the federal courts exclusive jurisdiction over any cases, although a few classes of cases have by act of Congress been made exclusive, such as cases involving federal crimes or concerning patent rights. In most instances, suit may be brought in either the courts of the state of the defendant or in the courts of the United States. This gives a great advantage to the plaintiff, for he can choose which of the two systems of courts he prefers. To correct this and give to the defendant access to the courts of the United States it is provided that in certain classes of cases he may "remove" the case to the federal courts. Thus, in such a case the defendant who has been brought into a state court has the same opportunity as the plaintiff to use the federal courts. In removals the whole case is transferred to the proper federal court.

In addition to those cases that originate in the federal courts and those that are removed into them from the state courts, there are those that go through a state court system and are then taken to the United States Supreme Court for final adjudication. These cases have been tried in a state court and have gone through all the appeals that the state laws permit. They have been passed upon by the highest state court having jurisdiction of the particular case in question. In nearly all instances this is the highest court of the state, although sometimes it may be a lower state court that has been given final jurisdiction. Therefore, all the remedies provided by the state have been exhausted. Such cases may, if permitted by federal law, be taken to the Supreme Court of the United States. They are not taken to any federal court lower than the Supreme Court, for this would be derogatory to the dignity of the state.

The Law Administered

In deciding the cases that come before them, the federal courts often have to pass upon questions of law other than those in which the Constitution, statutes, and treaties of the United States

² See p 190

are involved. In such instances the present rule is to follow the law of the state in which the cause has arisen. There is no such thing as a common law of the United States as a whole, and according to the present rule the federal courts will follow the common law as interpreted by the individual states (Erie Railroad Co. v. Tompkins). In determining the meaning of state constitutions and law the decisions of the state courts are followed. In general, the latest decision of the highest court of a state is accepted as determining the state law.

District Courts

The federal judiciary, as set up under Article III of the Constitution, consists of three tiers of courts. At the bottom are the district courts, of which there is at least one in each state, although if the state is populous there may be several, each assigned to a particular district. In some of the courts there are two or even three judges, although normally there is only one. District courts are courts of "original" jurisdiction, that is, they are courts into which cases are first taken and tried. The term "original" jurisdiction is opposed to "appellate" jurisdiction, which is the jurisdiction of the court to which the case is appealed. It is in the court with original jurisdiction of the case that witnesses are heard and evidence taken, while in the court with appellate jurisdiction no new evidence is entered and at the most the court has the evidence transmitted from the first court and the further arguments of counsel are heard. The district courts, then, have only such cases as are brought before them by the plaintiff or are removed to them from state courts at the instance of the defendants. Their jurisdiction is carefully regulated by statute, but in any case they have jurisdiction only over cases involving "federal questions" and those that come to them because of the nature of the parties.

The district courts have the power to appoint United States Commissioners, who correspond roughly to the state justices of the peace. Their most important functions are to issue warrants, to fix bail, and to bind over prisoners for the grand jury for trial. Their term is four years.

Circuit Courts of Appeals

Above the district courts are the circuit courts of appeals. They have no original jurisdiction but are limited to appeals, most of which come from the district courts. Altogether there are ten circuit courts of appeals, which meet at convenient places in the ten judicial circuits into which the country is divided. For each circuit there are at least three judges, but in some circuits there are four or six. A justice of the Supreme Court is assigned to each circuit, one of the justices being assigned to two. They formerly "went on circuit" and sat as members of the circuit courts of appeals to which they were assigned, but the increased business of the Supreme Court, the size of the country, and sometimes the age of the members, makes the practice undesirable, and now it is obsolete. Judges of the district courts may in emergencies be designated to sit upon the circuit courts of appeals. In many instances the decisions of the circuit courts of appeals are final, but in others the cases may go on to the Supreme Court.

An act of Congress, passed in 1922, provides for an annual conference consisting of the ten senior circuit judges, one from each judicial circuit, meeting in Washington in September under the presidency of the Chief Justice. Each senior circuit judge brings with him a report from the senior district judge from each district court in his circuit, setting forth the condition of business in that court, including the number and character of cases on the docket, cases disposed of, and other facts, as well as recommendations as to the need of additional judicial assistance. The conference can then prepare plans for the transfer of judges to or from districts and circuits for the more expeditious disposal of business. This Judicial Council, or Judicial Conference of Senior Circuit Judges, has done much to expedite business in the federal courts, has worked out methods of providing statistics, and has proposed other reforms for improvement of the administration of justice. In 1937, an act of Congress authorized the assignment of district judges to district courts in which business had become congested, thus providing means of making effective the plans of the Judicial Council. The assignments are not controlled by the Council, however.3

⁸ See p 203

The Supreme Court

The Supreme Court is the highest court of the United States. It is one of the most powerful, dignified, and respected bodies in the world. Of all American institutions it has evoked the most universal respect of foreign observers. This is due in part to its power, for in our system the courts exercise important prerogatives that are not common in other countries. It is in part due to the broad wisdom by which the court has usually been guided and the character of the men who have composed it.

The Constitution does not fix the number of members of the Supreme Court. Originally there were six, but at present there are nine. Their age level is high, for most Presidents have been careful to nominate only men who already have distinguished themselves on the bench or at the bar.

The jurisdiction of the Supreme Court is both original and appellate, but the original jurisdiction is strictly limited. By the terms of the Constitution the Supreme Court has original jurisdiction in cases affecting ambassadors, other public ministers, and consuls, and those in which a state is a party. It has been held (Marbury v. Madison) that it is not permissible to extend the original jurisdiction to any other cases. As there are very few cases involving states or the representatives of foreign countries, not many cases of this class go to the Supreme Court. Even where the jurisdiction of the Supreme Court is original it is not necessarily exclusive. In other words, even those cases that might be brought to it as a matter of original jurisdiction, it appears, may be tried in lower courts if Congress gives them the jurisdiction and if the parties are willing.

Most cases reach the Supreme Court as a part of its appellate jurisdiction. Unlike its original jurisdiction, the appellate jurisdiction is completely subject to regulation by Congress. In 1925, the laws upon this subject were revised so as to bring about a great change in the business of the Court.

Before 1925, there were four principal methods by which appellate jurisdiction was secured. The first was through the writ of error. Historically, the writ of error was a common law writ used in law cases by which a higher court brought before itself a

case in which it was alleged that a mistake in the law had been made in a lower court. The reviewing court was limited in such cases to a consideration only of the problems of law involved and did not review the facts.

Secondly, cases were brought up by the process of appeal, which historically was a civil law remedy used in equity 4 cases. The reviewing court considered both law and fact. The use of both writs of error and writs of appeal had been regulated by statute, and alterations had been made in the historic procedure. The writ of error was used in all cases to bring up from the highest court of a state a case in which a federal statute or treaty or authority exercised under the United States had been held invalid or in which a state statute alleged to be in violation of the federal Constitution or laws had been upheld. Both writs were used to bring up from the circuit courts of appeals all cases in which a federal question was involved, except certain classes of cases in which the decision of the circuit court of appeals was made final; and to bring up from the district courts cases involving the construction or application of the Constitution, the constitutionality of federal laws, the validity or construction of treaties, cases in which a state constitution or statute was claimed to contravene the United States Constitution, prize cases, and questions concerning the jurisdiction of the district court. The writ of error could be used to bring up certain classes of criminal cases from either circuit courts of appeals or district courts. Since these two writs were granted as a matter of right, that is, without discretion on the part of the issuing court except to determine whether they came within one of the classes mentioned in the statute, the docket of the Supreme Court was crowded.

In the third place, it was permissible for a circuit court of appeals to certify to the Supreme Court questions of law involved in a case before it upon which it was in doubt. The Supreme Court could then either answer the question or have the whole case brought up for consideration.

A fourth method was through the writ of certiorari. This is a writ issued from a higher to a lower court ordering a case to be brought before it. It is not granted as a matter of right but only

⁴ See p 359

where the higher court sees in a case some question that it considers of sufficient importance to warrant the action. The entire case may then be considered by the court. It was used to bring up cases from the circuit courts of appeals where the decision of the lower court was made final; and cases in which a state court had upheld the validity of a treaty, statute, or authority exercised under the United States, or had held invalid a state statute or authority exercised under the state on the ground that it was repugnant to the United States Constitution, laws, or treaties, or had decided either in favor of or against a claim to a title, right, privilege, or immunity under the United States.

The writ of prohibition, to restrain a lower court from exceeding its jurisdiction, the writ of mandamus, to compel a lower court to perform some duty, and the writ of habeas corpus, to compel the production of a prisoner for a preliminary hearing, were, and still may be, used by the Supreme Court in proper cases in the exercise of its appellate jurisdiction.

The legislation of 1925, known as the Jurisdictional Act, reduced the number of cases that could come to the Supreme Court as a matter of right. It provided that (1) cases in which the highest court of the state having jurisdiction of the case decided against the validity of some statute or treaty of the United States or decided in favor of some statute of the state which was alleged to be in violation of the United States Constitution, laws, or treaties, could be brought up on writ of error; (2) cases in which a United States circuit court of appeals had held a state statute to be in violation of the Constitution, treaties, or laws of the United States were made subject to review by writ of error or appeal; and (3) certain limited classes of cases from the district courts were made subject to direct review. In 1937, the limitations of this act were relaxed somewhat so as to permit appeals to the Supreme Court direct from any lower federal court in which an important federal act has been declared unconstitutional. 1928, the writ of error was abolished and it was provided that the appeal should be used in its place, although in some instances the Supreme Court still does not review the facts in the case.

The result of this legislation has been to limit greatly the number of cases which can come to the Supreme Court as a matter of

right. However, anticipating that some cases which did not fall within one of the categories mentioned might nevertheless involve questions upon which the Supreme Court would desire to pass judgment, the Jurisdictional Act provided that the writ of certiorari might be issued to a state court where the case (1) involved the validity of a treaty or statute of the United States; (2) involved the validity of a state statute alleged to be in conflict with the Constitution, laws, or treaties of the United States; or (3) where any title, right, privilege, or immunity was claimed under the Constitution, a treaty, a statute of the United States, or a commission or authority exercised under the United States. It was also provided that the writ of certiorari might be issued to a circuit court of appeals to bring up any case that the Supreme Court desired to review. Ouestions may still be certified as before by the circuit courts of appeals. In sum, the number of cases that may be brought before the Supreme Court as a matter of right have been reduced, while an opportunity is still left for it to review such others as it may for any reason desire to consider.

The Jurisdictional Act of 1925, as well as the Judicial Conference of Senior Circuit Judges, is largely due to the influence of Chief Justice Taft, who brought to the Supreme Court his years of experience in administration, and who, by these reforms, enabled the federal courts to take a position of leadership in the improvement of American judicial administration.

Judicial Review >

The Supreme Court occupies a more important position in our system of government than is the case with the courts of most other countries. This comes about through its power to pass upon the constitutionality of acts of Congress and of the state legislatures. By the terms of Article Six, the Constitution, laws in pursuance thereof, and treaties under the authority of the United States are the law of the land. The Supreme Court has taken the position that it must apply the law to any case before it and that an act of Congress or of a state legislature is not law if it is in conflict with the Constitution. In further support of this contention it is pointed out that the judges are bound by oath to support the Constitution.

However, there are some Constitutional questions upon which the Supreme Court is not the final arbiter. It does not review impeachment cases or cases in which the houses of Congress have passed upon the qualifications of their membership. There are also certain questions known as "political questions" upon which it accepts the decision of the legislative or executive branch as final. For example, the Supreme Court has refused to determine whether a state has a "republican form of government" within the meaning of Article IV, Section 4 (Pacific States Telephone & Telegraph Co. v. Oregon); to determine which of two rival governments within a state is the established one (Luther v. Borden); and to restrain the enforcement of the Reconstruction Acts (State of Georgia v. Stanton).

There is at least one type of problem arising under the Constitution which is determined finally by a state officer. The Constitution requires that when a criminal flees from one state to another and a proper request for rendition is filed, he "shall . . . be delivered up" (Article IV, Section 2). Nevertheless, a federal court will not issue a writ to a state governor who refuses to surrender such a fugitive. In this case it is a state authority who gives the final interpretation to the Constitutional duty.⁶

Moreover, the obligation to observe the limitations of the Constitution is not an obligation upon the courts alone. Congress and the President are no less bound to keep within the Constitutional limits. In fact, Mr. Taft, who combined an exceptionally judicial temperament with experience as President and knowledge of the law, argued that the obligation to observe the Constitution was even greater on the President and Congress than upon the Supreme Court, for the reason that when a disputed law is brought before the Supreme Court it arrives with a presumption in its favor. Since the legislative branch has approved it, the courts give to the act the benefit of the doubt. On the other hand, while the law exists only as a proposal in the form of a bill still before Congress or lying unsigned on the desk of the President, there is no presumption in its favor. It follows that

⁵ See p 89

⁶ See p 298.

the obligation is greater upon the President and Congress to observe care in keeping within Constitutional limits.

However, most Constitutional questions may eventually be brought before the Supreme Court, and since the courts are the enforcing authorities who apply the law to individuals, it is upon the courts that the final determination of constitutionality must fall.

The position of the Supreme Court that it will not apply an unconstitutional statute in any case before it has not been maintained without opposition, for some have contended that Congress, as the fundamental branch, representing the people and the states, should have the power to decide whether its laws are in conflict with the Constitution. They have in support of their contention the example of other countries where the legislative organ is supreme. Even in France, which in large part has a written constitution, the legislature interprets its own powers. The stand taken by the Supreme Court is so logical, however, that it has been able to maintain its position. Marbury v. Madison, the great decision in which it applied the principle to an act of Congress, did not arouse as much opposition from its elucidation of this contention as it did from certain other points in the reasoning. As for declaring acts of state legislatures invalid, the colonists had become accustomed to a quite similar practice in the disallowance by the home government of colonial statutes which were in conflict with the charters. It should be observed, also, that as the Constitution is part of the law of the land it is binding upon all courts, and that any court in the country may, and in fact under the principles governing our constitutional system must, refuse to enforce any act that it believes is unconstitutional, until reversed by a higher court. The power of the courts in this respect is known as "judicial review."

In recent years there has been a renewed opposition to the doctrine of judicial review. It has not usually taken the form of a denial of the principle that the courts should refuse to enforce, an act in conflict with the Constitution, but rather has manifested itself in the form of a desire to place some limitations, upon the exercise of the power of the Court to hold acts of Con-

gress unconstitutional. There have been two factors that have contributed to this attack. One has been the fact that there have been a number of important five-to-four decisions in the Supreme Court holding acts of Congress unconstitutional. The critics of judicial review are not able to see why the validity of any law passed by a majority in both houses of Congress and signed by the President should depend for its operation upon the opinion of any one man, the ninth judge. They hold that if the unconstitutionality is so doubtful that four judges cannot agree with the majority, the law should be enforced by the Court.

This attack has been strengthened by the type of acts that have been held unconstitutional. It is alleged that the courts have built up a philosophy that is more sympathetic toward the sanctity of private property than toward human rights, and that too many acts which were designed to protect the mass of the people against the encroachments of great modern combinations of wealth have been held not to be "due process of law" or otherwise in conflict with provisions of the Constitution. To counteract this tendency of the Court it has been proposed that the Constitution be so amended as to require more than a mere majority verdict to hold an act of Congress unconstitutional.

In answer to this argument it has been pointed out that the courts follow a rule of construction which gives the benefit of any doubt upon the constitutionality of an act of Congress in favor of its validity This means that if a member of the Court is in doubt, presumably he resolves it in favor of the statute. Moreover, if there are two reasonable interpretations of an act, one of which would make it constitutional and the other unconstitutional, it will be given the construction that makes it constitutional. Furthermore, if only part of an act is unconstitutional, this will not invalidate the whole act, unless the unconstitutional part is necessary to the purposes of the remainder. In addition to this, the Supreme Court does not usually hold an act of Congress unconstitutional except upon a majority of the whole Court. In any case, if a decision can be reached upon other grounds without passing upon the question of constitutionality, the Court will usually do so.

The theory is that the courts merely interpret law. No court would contend that its function was to make law or to do anything other than determine what the law is and apply it. Yet judicial review brings the courts into a position which is little different from the making of law. The Constitution is a broad instrument. It deals with matters in only the most general terms. It was not intended to apply to a single situation or a single period, but to speak in a language that would permit its application to future ages and changed conditions. The commerce clause applies today to the steam engine, the airplane, the telephone, and the radio as it once did to the coach-and-six. When an instrument deals in such general terms there is much leeway within which the Court may act. Its decision upon the constitutionality of any new legislation is going to depend somewhat upon whether society at that time regards such legislation as proper. The minute regulation of interstate carriers, now accepted as proper and held entirely valid, would not have been submitted to in an earlier period and probably would have been held unconstitutional. Much, therefore, will depend upon the environment of the judges and their views of the propriety of the legislation. This is desirable, for if the judges of our day had the background of an earlier period they would declare much worth-while legislation invalid.

In other branches of law, it is desirable that the rule of stafe decisis should obtain, one decision controlling the next, for no one would know how to behave when the courts decided one way today and another tomorrow. But the rule of stare decisis has less application in constitutional law, for here we have a broad instrument that must be so interpreted as to meet changing conditions. It appears then, that in constitutional law, where there is so much desirable latitude, the courts do actually make law. They must consider social conditions when they interpret the Constitution. In exercising this power the Court usually has shown a broad wisdom. Some of the recent attacks, however, have been due to a belief that the Court has failed upon some social matters to keep pace with the times. It is charged that some judges are imbued with theories of property rights that were held by the eighteenth-century individualists, whereas soci-

ety has moved on to another concept. This explains why in recent years the Senate usually has given careful scrutiny to Presidential nominations to the Supreme Court. Senators not only demand that a judge be learned in the law and of an impartial and judicial mind (although in one recent instance their investigation in this respect appears to have been perfunctory), but they also inquire into his past professional and social associations in order to ascertain whether he is likely to possess the attitude toward economic and social conditions that they believe are representative of this age. They want to discover whether he will show undue sympathy toward public utility companies or other great combinations of wealth. It is alleged that this is equivalent to "packing" a presumably impartial judicial body, but it is answered that judicial review has constituted the Court into a legislative body which properly should not be unresponsive to broad changes in social attitudes.

The administration of President Franklin D. Roosevelt has witnessed one of the greatest crises in the history of the Supreme Court.

Mr. Roosevelt came into office in the middle of the panic phase of a great depression. He had been elected by heavy majorities and proceeded promptly, backed by a Congress that was almost completely under his control, to enact a number of laws which were designed not only as measures of recovery but as steps toward economic and social reform.

In a series of decisions the Supreme Court cut down a number of these acts. The National Industrial Recovery Administration was declared invalid in a unanimous decision, an attempt to control petroleum production under the National Industrial Recovery Act was declared unconstitutional in an eight-to-one decision, the crop control plan administered by the Agricultural Adjustment Administration fell in a six-to-three decision, the Municipal Corporation Bankruptcy Law was held invalid in a five-to-four decision, the Railroad Retirement Act of 1934 was held invalid in a five-to-four decision, the Frazier-Lemke Farm

⁷ See p 624

^{*}See p 696

⁸ See p 726.

¹⁰ See p 596.

Mortgage Moratorium Act fell in a unanimous decision, ¹¹ and the Guffey Coal Act was held invalid in a decision in which the Court was divided differently upon different issues. ¹² Mr. Roosevelt's removal of a member of the Federal Trade Commission was held invalid in a unanimous decision, ¹³ and even the dollar devaluation law, upheld in a five-to-four decision as applied to private bonds and gold certificates, was held invalid in its applicability to federal bonds, although at the same time the bondholders were held to be without a remedy. ¹⁴

These decisions of the Supreme Court upon New Deal legislation brought the Court into the newspaper headlines. To the public there appeared to be taking place a struggle within the Court between "conservatives" and "liberals," between whom there was a definite cleavage. There was some basis for the belief that such a cleavage existed, although it was by no means as clear-cut as many believed.

With regard to the social legislation under which Congress and the states attempted to improve conditions of life, impaired by modern economic and industrial changes, the conservatives often found that such legislation was not authorized by the Constitution or was prevented by such Constitutional impediments as the provisions upon "due process of law." ¹⁵

On the other hand, Justice Holmes, recently retired from the Court, had enunciated a "liberal" philosophy under which the Court would recognize that modern conditions called for the exercise of much legislative discretion into which the courts were not competent to inquire. He did not believe that the Constitution through such provisions as those dealing with due process of law prevented the legislature from exercising its judgment in restricting within reasonable limits the rights of the private owners of property in the interests of society. His liberalism consisted in leaving a larger field to the judgment of the legislature. Justice Brandeis has been associated with a more positive type of "liberalism," finding much of this social legislation definitely

¹¹ See p 729

¹² See p 697

¹³ See p 157.

¹⁴ See p 641.

¹⁵ See p 531.

desirable as well as justified under Constitutional provisions. While the methods of approach of the two justices were different they were likely to arrive at the same conclusion, that is, an opinion upholding particular acts of social legislation. The theories of these two justices came to be looked upon as typifying the liberal position.

It must not be understood, however, that the justices are easily tagged and classified Even upon New Deal legislation, some of the most important decisions were unanimous, and others were by wide or fairly wide margins.

However, the decisions adverse to New Deal legislation were displeasing to Mr. Roosevelt, and upon his reelection to the Presidency, supported by heavy majorities, he moved against the Court. On February 5, 1937, he startled the country with a message to Congress upon the subject of judicial reorganization. The President said that he must deal with "a subject of delicacy and yet one which requires frank discussion." He spoke of delays in the determination of suits in the courts and found a cause in the age of judges. He spoke of the heavy burden under which the Supreme Court was laboring, and, apparently referring to the use of certiorari under the Jurisdictional Act, complained of the number of refusals to hear cases for which review was requested. He also found that older judges were likely to get out of step with the times, and suggested "lowered mental or physical vigor" of older men who "cease to explore or inquire into the present or the future."

Mr. Roosevelt's message was accompanied by the draft of a proposed bill which provided that when any federal judge should reach the age of seventy, having held his commission for ten years, and did not within six months either resign or retire, an additional judge should be appointed to the court of which he was a member. Not over fifty judges could be appointed under this plan, and a maximum membership for each court was provided, which in the case of the Supreme Court was to be fifteen. The proposed act also provided that circuit judges appointed hereafter might be assigned by the Chief Justice to any circuit court of appeals, and district judges might be assigned to any district court. This provision presumably was designed to per-

mit the assignment of judges to courts with congested dockets. There was also provision for a proctor in connection with the Supreme Court who would gather information upon the status of litigation in the lower courts, and investigate the need of assigning judges from one court to another, and perform other like duties under the direction of the Supreme Court.

The President's proposal met with immediate and violent opposition from both liberal and conservative ranks. It was received as thinly-veiled effort to secure power to "pack" the Court in favor of New Deal legislation. Only three of the justices at that time were under seventy. The relationship between age and the attitude toward modern problems was flatly denied, and instances of "liberal" judges of advanced age were recalled.

In reply to an inquiry from Senator Wheeler, the Chief Justice, Mr. Hughes, summed up the condition of business in the Supreme Court and submitted figures showing that the Court was in fact well up with its work. Upon the criticism concerning rejections of petitions for certiorari he pointed out that about sixty per cent of the petitions were wholly without merit, that about twenty per cent more failed to survive a critical examination, and the remainder were granted. Mr. Hughes further expressed the belief that an increase in the size of the Court, if it continued to function as a unit, would impair rather than promote efficiency. Upon reported suggestions that with more justices the Court might be divided into divisions for the hearing of cases, he pointed out that a large part of its cases were important and a decision by only a part of the whole Court would be unsatisfactory. He also called attention to the Constitutional provision for "one Supreme Court" which did not seem to permit the establishment of two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts.

This letter was a severe blow to the President's proposal. Thereafter, the argument in its favor was shifted from the original grounds of slowness and congestion in the courts to a more candid statement of a real intention to change the complexion of the Court.

While the debate upon the more controversial phases of the President's proposal was in progress, Congress passed a retire-

ment law for Supreme Court judges, granting them the same returement privileges as those enjoyed by judges in the lower federal courts. Previously, Supreme Court judges desiring to retire had been under the necessity of resigning, with the result that their retirement pay was subject to reduction. Under the new law, a retired Supreme Court judge is merely retired from regular active service. The Chief Justice may call upon him to perform judicial duties in the lower courts, provided the retired justice is willing to serve. Since the retired justice has not resigned and is available for service, presumably he is still a federal judge and his salary is not subject to reduction.

One of the "conservative" justices took advantage of this act to retire from the Court. Mr. Roosevelt recommended the appointment of Senator Black, of Alabama, to the vacancy. "Senatorial courtesy" called for favorable action by the Senate upon the appointment of one of its membership and after a perfunctory examination into his qualifications, Mr. Black's nomination was confirmed. Subsequently it was charged publicly that Mr. Black had been a member of the Ku Klux Klan. In an address to the country Mr Black admitted this charge, but asserted that he had resigned his membership.

Meantime, the Supreme Court had handed down a number of decisions supporting the constitutionality of Mr. Roosevelt's legislation. This, together with the Black appointment, appears to have been sufficient to bury the President's Supreme Court proposal. The subsequent resignation of another "conservative" justice opened the way for another appointment. Mr. Roosevelt recommended a lawyer of standing for this vacancy.

Out of all this controversy came two acts of Congress. The first of these was the retirement law for Supreme Court judges, referred to above. The other was an act designed to prevent the invalidation of federal laws in the lower federal courts in cases between private litigants without opportunity for the Department of Justice to defend the federal law. It permits the United States to intervene in such cases and defend the constitutionality of the law which is in dispute. In the event that a federal law is held unconstitutional in a lower court a direct appeal may be taken to the Supreme Court. The new law also

limits the use of injunctions by federal judges to prevent the enforcement of federal laws on the ground of unconstitutionality except upon a hearing before three judges, one of whom must be a circuit judge. An exception is made for temporary restraining orders by single judges where irreparable loss might be suffered by an individual if immediate action were not taken. This act also provides means of expediting business in district courts by permitting the senior circuit judge of a circuit to assign a judge from one district court within that circuit to the court in which business is congested, and permits the assignment of judges from other circuits by the Chief Justice of the United States under some circumstances.

Other Federal Courts

The Supreme Court, the circuit courts of appeals, and the district courts constitute the regular hierarchy of courts in the federal judicial system. In addition to these there are certain federal courts that have been created for particular purposes. Congress may set up such tribunals, without granting life tenure to the judges and without the other provisions for protection provided in Article III, for the reason that they are not "Constitutional" courts. They are "legislative" courts (Ex parte Bakelite Corp.). To the class of "legislative" courts belong the courts of the territories and those in the District of Columbia that are strictly local in nature¹⁶ (American Insurance Co. v. Canter). The consular courts and the United States Court for China are held under extraterritorial jurisdiction in China and their Constitutional status is similar to that of the territorial courts.

The Court of Claims consists of five judges appointed by the President with the advice and consent of the Senate, with tenure during good behavior. It has jurisdiction over claims against the United States where such claims come within certain classes designated by Congress. Since the United States cannot be sued without its own consent, only such claims can be prosecuted in this tribunal as Congress may permit. Where persons have claims against the United States that are not within the jurisdic-

¹⁶ See p 277

tion of the Court of Claims their only redress lies in a special act of Congress. Each year there are many such acts. The departments may refer individual cases to the court and either house of Congress may turn cases over to it merely for a report upon the facts. After a claim has been granted by the court the money cannot be paid over except in accordance with some general or special act of Congress. Essentially, the Court of Claims is merely an administrative tribunal which exists for the purposes of relieving Congress of irksome duties and of securing a careful, expert, and unbiased judgment upon the merits of those matters over which it has been given jurisdiction.

The United States Court of Customs and Patent Appeals is another administrative tribunal. It consists of five judges appointed by the President with the advice and consent of the Senate. It hears appeals from the United States Customs Court upon the classification and evaluation of merchandise subject to customs duties, and also takes appeals from the United States Patent Office in patent cases. The Interstate Commerce Commission and the Federal Trade Commission are administrative tribunals of a similar nature. Such bodies as the Board of Tax Appeals, which hears certain appeals in connection with the internal revenue laws, are quasi judicial in nature. Sometimes temporary bodies, such as claims commissions and international arbitral tribunals, are set up to settle individual disputes or groups of cases. In fact, even individual officers often have duties of a judicial nature to perform.

These administrative tribunals are made necessary partly because of the technical nature of the matters submitted to them. The ordinary courts do not have the necessary time or the technical information. Moreover, the administrative tribunals may be given jurisdiction over matters that could not be given to the regular courts. A court that is not a member of the regular judicial system may be called upon to amend the valuations and rates as fixed by a public utilities commission, but a court created under Article III of the Constitution will not accept such duties, since they are not a part of the judicial function (Keller v. Potomac Electric Power Co.). It is true that the regular

¹⁷ See pp. 599, 611

courts do accept cases in which it is alleged that valuations or rates fixed by administrative bodies are so low as to deny due process of law.¹⁸ In passing upon this question, however, they are performing a judicial function which is entirely distinct from the administrative function of determining just what the rate shall be.

The Judicial Power Limited To Cases

The federal courts in the regular judicial system created under the provisions of Article III of the Constitution have insisted that they are purely judicial bodies. They refuse to accept administative duties except within the provision of the Constitution under which Congress may grant them the power to appoint inferior officers. Any other administrative duties that Congress may impose upon them will be refused as unconstitutional, on the ground that the Constitution has vested the judicial power in the courts as an independent branch of government. Many state courts perform administrative duties and the federal "legislative" courts may be given administrative duties.

As purely judicial bodies, the Supreme Court and other federal courts refuse to decide questions of law except in connection with a "case," an actual controversy brought properly into court. "Moot" cases, that is, cases that are brought before the court merely to get an interpretation of the law without a controversy actually being involved, are not accepted. The reason for not accepting suits of this sort is that it is deemed essential to the public interest that no question be passed upon until both sides have been presented by counsel representing parties who are actively interested in presenting their respective contentions.

Following the same principle the Supreme Court has refused to hand down "advisory opinions." An "advisory opinion" is an opinion handed down by a court upon some legal question submitted to it by an executive or legislative authority. Such questions usually are upon the constitutionality of some proposed legislative act. The usefulness of opinions given under circumstances of this sort is apparent. An act may be passed and

¹⁸ See p 553

stand upon the statute books for years without being questioned, and then if someone carries a case to court, it may be found that the public has been acting under an unconstitutional statute during the whole period. Individuals and corporations may have lost great sums through having complied with the act. They would have been saved these losses if in the beginning the Court could have passed upon the matter of constitutionality upon a request from the executive or legislative authorities. Some state courts do actually exercise this power of giving advisory opinions. The Supreme Court of the United States, however, refuses to give such opinions, on the ground that the federal courts are limited to the exercise of judicial power, and this means that the Supreme Court must decide controversies only. An advisory opinion would be subject to the same objections that apply to "moot" cases.

Opinions and Decisions

The reasons for holding the act constitutional or unconstitutional usually will be stated in the "opinion," which is the statement of the reasoning of the court. Where a conclusion upon a constitutional point is essential to the process through which the court came to its decision, this conclusion is binding upon state and lower federal courts in future cases. Such conclusions also have much binding force upon the Supreme Court in later cases, although that Court may possibly reverse its decision. Where a question of constitutionality, or any other legal question, is passed upon in the opinion, and a decision upon that point was not really essential to the decision, but was merely passed upon incidentally, the reasoning is known as "obiter dictum" and has no binding force, although it may have persuasive influence in later cases.

One of the judges writes the opinion of the court in each case. In the Supreme Court the Chief Justice assigns the writing of the opinion to one of the justices who has voted with the majority, provided the Chief Justice is of the majority; otherwise the senior Associate Justice among the majority performs the duty of assigning the opinion. Where a judge has not agreed with the majority he may hand in a "dissenting opinion," and where

he has agreed in the decision but has followed a different line of reasoning from that in the opinion of the court he may file a "concurring opinion." Sometimes a dissenting or concurring opinion of a strong judge has great influence in subsequent cases. The dissenting opinions of Justice Holmes, for instance, have become famous through their enunciation of a certain legal philosophy.

The opinion in a case must be carefully distinguished from the decision. The latter embodies the conclusion of the court upon the particular facts and circumstances of the controversy which is being settled in any one case and is usually expressed in an order of some kind by the court, as, for instance, awarding damages or enjoining one of the parties from performing some act. In the case of a higher court there may be a concurrence with the decision of a lower court, or a reversal or a modification of its decision, or a return of the case to the lower court for modification, or some similar action.

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CHAPTER XI

Citizenship and Immigration

The importance of citizenship in the state and the nation can hardly be overestimated. The qualifications for office rest upon citizenship. The election of officers depends upon citizenship, because in virtually every state in the Union only citizens properly qualified can vote.

Who Are Cetezens

The Fourteenth Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Birth in the United States, subject to its jurisdiction, is sufficient to confer citizenship of the United States. United States citizens automatically acquire state citizenship by residence within a state.

Since national and state citizenship are distinct, it is possible to be a citizen of the United States without being a citizen of a state. United States citizens residing in the District of Columbia, in the territories, or abroad, have only the single citizenship, since they do not reside in a state. Most citizens of the United States, however, are also citizens of a state, and thus hold a dual citizenship.

Privileges and Obligations

This dual citizenship, national and state, brings with it a double set of obligations and a double set of privileges. Such a citizen has the privilege of claiming the protection of the United States government and of his state government. Citizens of the United States while abroad are protected by the United States government.

Ordinarily, only citizens of the United States, and of the state involved, may qualify for the suffrage. In most states only citizens qualify under workmen's compensation laws. If an alien goes to a public hospital for aid, he may be deported for having become a public charge; a naturalized citizen may not be so deported. If an alien leaves the country, he must obtain permission to return. A citizen has the privilege of returning as a matter of right. Aliens are restricted in the holding of real estate in many states in the Union. Citizens may hold real estate in every state and territory.

On the other hand, the citizen has obligations to both governments. He owes allegiance to both. He may be guilty of treason to his state as well as to the United States, although there is no question now that his allegiance to the United States comes before that which he owes his state.

The distinction between citizenship of the United States and citizenship of a state by the same individual is brought out with considerable clearness in the Slaughterhouse Cases (Butchers' Benevolent Association v. The Crescent City Live Stock Landing and Slaughterhouse Company). In the exercise of its police power for the protection of health the state of Louisiana had chartered a company and given it the exclusive privilege of slaughtering animals for food in the city of New Orleans, except that individual butchers might slaughter at the abattoirs of the company upon payment of a reasonable fee. It was claimed that this was a violation of various clauses of the Constitution including the clause of the Fourteenth Amendment that reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States " It was contended that it was one of the privileges of a citizen of the United States to carry on his occupation without such restriction as this statute of Louisiana placed upon the butchers of New Orleans. The decision upon this point was of importance. To uphold the contention of the opponents of this act would be to hold that the practice of a profession or an occupation was a privilege of a citizen of the United States, and that therefore this was a matter removed from the control of the states. It would have transferred the police power of the states to the federal government and would have done much toward wiping out state lines. The Supreme Court repudiated this doctrine and held that the Fourteenth Amendment meant to keep the two citizenships distinct. Federal citizenship was acquired merely by birth or naturalization in the United States and by being under its jurisdiction, while state citizenship was acquired as a consequence thereof by residence within a state. The Court held that this distinction made in the first sentence of the Fourteenth Amendment must still have been in mind when the second sentence was framed and that the phrase "privileges or immunities of citizens of the United States" referred only to the privileges and immunities that adhere to citizenship of the United States as distinct from the privileges and immunities of state citizenship. The Court further declared that all the fundamental privileges and immunities of citizenship belonged to state citizenship. These were the privileges and immunities that existed in the states before there was a federal government. They included the right to acquire land, the right to practice a profession, and the like. To federal citizenship belonged only those privileges and immunities that could not have existed had there been no federal government. These the Court refused to enumerate, but suggested they would include the right of access to the seat of government for the purpose of asserting claims, carrying on business with it, and the like, the right of protection abroad, the right to assemble and petition the federal government, the right to the writ of habeas corpus, the right to use the navigable waters of the United States, the rights secured by treaty to citizens of the United States, and the right to secure state citizenship by residence therein. This decision reduced the effect of this clause to a minimum, leaving to the states the broad power to regulate occupations.

Ways of Acquiring United States Citizenship

Citizenship of the United States may be acquired by birth, by naturalization through the five-year process, by group naturalization under a statute, by group naturalization under a treaty, by a combination of marriage and a naturalization process, by a

combination of military service and a naturalization process, and by the naturalization of the head of the family covering that of the minor children.

Citizenship by the Jus Soli

Persons born in the United States, subject to its jurisdiction, acquire citizenship at birth. This is true even of the children born of alien parents living in the United States, provided the children remain here until after the twenty-first birthday. Even the children of foreign parents ineligible to naturalization are citizens if born in this country (United States v. Wong Kim Ark) Citizenship by place of birth is sometimes referred to as acquired by the *jus soli*. If the parents should definitely leave the United States and take the children with them, the citizenship of the minor children would as a rule follow that of the head of the family, that of the father ordinarily, or if the mother is a widow, that of the mother.

Since an "unincorporated" territory is not, in a strict sense, a part of the United States, birth within such a territory does not carry United States citizenship. Citizens of such territories, however, owe allegiance to, and are termed "nationals" of, the United States. However, by special act, United States citizenship has been granted to the people of some of these territories. This is true of Puerto Rico and the Virgin Islands.

Not only must there be birth in the United States, in this strict sense of the word, to acquire citizenship under the Fourteenth Amendment, but the birth must have taken place under the jurisdiction of the United States. Thus, the children of foreign ambassadors and ministers do not become citizens of the United States, for, even though born within the boundaries of the United States, they are not technically "subject to the jurisdiction thereof." The same principle formerly applied to Indians, who, although born within the territorial limits of the United States, were subject to their tribal governments and therefore were not under the jurisdiction of the United States within the meaning of this part of the Fourteenth Amendment. Indians are now citizens, having been given this status by statute.

¹See p 252

Citizenship by the Jus Sanguinis

A child born abroad, if either of the parents is an American citizen, becomes an American citizen, and would, no doubt, meet the citizenship requirements for the Presidency of the United States. This is sometimes called the acquiring of citizenship by the jus sanguinis. If one of the parents is an alien, however, the right of citizenship does not descend to the child unless he resides in the United States five years continuously immediately previous to his eighteenth birthday and unless within six months after the twenty-first birthday he takes the oath of allegiance. However, the rights of citizenship do not descend to a child unless the citizen father or citizen mother has resided in the United States previous to the birth of the child.

Naturalization Under the Five-Year Process

Only aliens who are free white persons and aliens of African nativity and persons of African descent may be naturalized. The consequence is that Japanese, Chinese, Siamese, the people of India, and for the most part the people of the islands in the eastern part of the Indian Ocean may not be naturalized. This applies to the Filipinos, except for those who have declared their intention of becoming citizens and have served for not less than three years in the United States Navy, Marine Corps, or Naval Auxiliary, and have been honorably discharged. And these are gradually becoming fewer in number.

By law certain other groups have been excluded from naturalization: Anarchists, polygamists, aliens unable to speak the English language (unless they are physically unable to do so), and aliens from neutral countries during the World War who withdrew their declaration of intention in order to evade military service. During war, alien enemies are usually not permitted to become naturalized.

Under the five-year process an alien establishes his domicile; then he appears before a clerk of a court authorized to naturalize aliens and states under oath that he intends to renounce allegiance to his home country and to become a citizen of

the United States. This is called the taking out of "first papers." He must be at least eighteen years of age in order to qualify for these papers. Two years must elapse between the granting of the first and the granting of the second papers but not more than seven years. At the end of the five-year period. he appears before the proper court, that is, a United States district court or a state or territorial court of record having a seal. a clerk, and jurisdiction over cases of law or equity in which the amount is unlimited, and petitions for his final or citizenship papers. His petition must show that he has resided in the United States at least five years immediately preceding the date of the petition, that he has lived six months immediately preceding in the county in which he resides at the time the petition is filed, and that he is of good moral character. His statements must be supported by testimony from two credible United States citizens. His petition must show when and how he came to the United States, state that he can speak English, that he is not a disbeliever in organized government or a polygamist, and that he is attached to the principles of the Constitution. The court customarily designates one or more examiners to conduct a prelimmary examination upon the petition. After this a hearing on the petition is held in open court, where the applicant and witnesses are examined under oath. Before being admitted to citizenship the applicant must renounce allegiance to all foreign governments, and particularly to the one of which he has been a citizen or subject, and must swear to support and defend the Constitution against all enemies, foreign and domestic. Final action upon a petition for naturalization may not take place until after ninety days have elapsed since the filing of the petition and the certificate of naturalization may not be issued within thirty days preceding a general election. This latter provision is intended to avoid mass naturalization for the purpose of unduly influencing an election.

Special provisions are made in the naturalization laws for cer tain groups, particularly aliens who have served in the army or navy. These provisions generally relate to a simplified procedure or a shortened time for completing the naturalization process.

The oath has recently in two rather exceptional cases caused considerable discussion. Professor Douglas Clyde Macintosh of Yale University was born in Canada. He had an honorable record with the Canadian forces in the World War. His application for final papers before the United States district court was denied on the grounds that since he had a reservation about defending the United States against all enemies, he was not attached to the principles of the Constitution as required by the naturalization laws. He was not a pacifist; but he considered his allegiance first to the will of God and would not promise in advance to bear arms in defense of the United States under all circumstances; only if he believed the war to be morally justified. The Circuit Court of Appeals reversed this decree of the district court, but the Supreme Court affirmed the decison of the district court. The applicant could not be permitted in effect to alter the oath of allegiance (United States v. Macintosh).

Rosika Schwimmer was born in Hungary in 1877 and came to the United States in August, 1921 and took up her residence in Illinois. She was well educated, read several languages, and became a lecturer In November of that year she declared her intention of becoming a citizen. In September, 1926, she filed a petition for naturalization. She stated that the United States came nearest her ideals of a democratic republic and that she could wholeheartedly take the oath of allegiance. Question 22 asked: "If necessary, are you willing to take up arms in defense of this country?" She replied: "I would not take up arms personally." She saw no contradiction to the oath in her refusal to take up arms. She was forty-nine years of age when she filed her petition and probably would not have been called to take up arms even if she had desired it. She acknowledged that she was an uncompromising pacifist, and that she had no sense of nationalism—only "a cosmic consciousness of belonging to the human family." She did not care how many other women might fight, but she was not willing to bear arms.

Her petition was denied in the district court. On appeal to the circuit court of appeals, that decision was reversed. The Supreme Court affirmed the decree of the district court, taking the position that citizenship is a high privilege and when doubt exists concerning the granting of it, the doubt should generally be resolved in favor of the United States (United States v. Schwimmer).

Group Naturalization by Statute

The Puerto Ricans had citizenship conferred upon them as a group by the Jones Act of March 2, 1917; the Hawaiians by an act of April 30, 1900. All North American Indians born within the limits of the United States had citizenship conferred upon them by an act of June 2, 1924.

Group Naturalization by Treaty

Treaties have also conferred citizenship upon entire groups, as was done in the treaty for the acquisition of Louisiana in 1803, of Florida in 1819, of Guadalupe Hidalgo in 1848, of the Gadsden Purchase territory in 1853, of Alaska in 1861, and of the Virgin Islands in 1916.

The Citizenship of Married Women

During the Great War the American women who had married Germans and Austrians were classed as alien enemies. They suffered ostracism and their property was taken over by the alien property custodian. The consequence was the Cable Act of September 22, 1922. Under it American women marrying foreigners do not automatically take the citizenship of the husband, although they may do so by going before the proper court and making a declaration to that effect. So long as they live in the United States they may retain their American citizenship and have their rights as such respected. If an American woman marries a foreigner and goes to his home country to live, she will place herself under the laws of that country. In most foreign countries the wife takes the citizenship of the husband. Under such circumstances she can hardly claim protection from the United States as a citizen thereof. The Department of State may make representations in her behalf, but by the rules of comity it will not interfere with the normal enforcement of domestic laws in another country.

Prior to September 22, 1922, foreign women, qualified for naturalization, who married American citizens would thereby become full-fledged American citizens. After that date such a marriage to an American by a foreign woman qualified for naturalization would give her a preferred status but not citizenship. The marriage would be accepted in lieu of her declaration of intention and she need reside in the United States only three years immediately preceding the filing of the petition instead of the normal five years.

Minor Children of Naturalized Persons

The naturalization of the head of the family includes the naturalization of the minor children, provided they are within the United States. The children must have been legally admitted to this country. Sometimes the father comes to this country alone; the wife and children are left in the home country. He completes the requirements for citizenship and sends for his family. One of his sons perhaps is found to be feeble minded. He cannot enter. The other children are admitted and take up their residence with the father. They become American citizens. The wife may qualify under the shortened process provided by the Cable Act.

Adopted and Illegitimate Children

Children born in the United States of foreign parents and remaining under American jurisdiction are natural-born citizens. Alien children adopted by American citizens do not thereby have citizenship conferred upon them. As a rule illegitimate children take the citizenship of the mother. Children born on American merchant vessels on the high seas may not on that account claim they were born within the United States (Lane Mow v. Nagle).

Expatriation Treaties

With several countries the United States has negotiated socalled expatriation treaties, recognizing the right of their respective citizens to throw off their allegiance and to become naturalized in the other country. Usually the treaties specify a five-year process of naturalization and liability to punishment of the individual in the country of origin for crimes committed before emigration. A presumption of the loss of the new citizenship is created after two years residence in the country of origin. Among these countries are the Netherlands, Great Britain, Germany, and the Scandinavian countries.

Some countries hold tightly to the jus sanguinis and will not recognize the expatriation of their nationals when they return on a visit unless specific consent has been granted. Among these are France and Italy. A Frenchman naturalized in the United States and desiring to return to his native country without being subjected to military training or to penalties must apply to the French government for the recognition of his naturalization here and pay a fee. If the recognition is granted, he must preserve the certificate of recognition carefully for exhibition when he enters the French port. It is generally understood that naturalization in the United States does not cancel any obligations, such as claims to military service, which the person has incurred in his home country prior to taking out his final papers.

Forfested Citizenship

Should a naturalized citizen return to his home country or go to any other foreign country within five years after he has secured his certificate of naturalization and establish a permanent residence there, such action may be taken as prima facie evidence of a lack of intention to become a permanent American citizen and in the absence of countervailing evidence his certificate may be canceled as fraudulent. Whether a natural-born American citizen on pledging military allegiance to another country loses his citizenship may well be a question. Certain it is that for the period of his enlistment his first allegiance is to that country and for the same period his rights as an American citizen are in abeyance.

It is sometimes stated that persons convicted of felonies lose their citizenship. It is more correct to say that they may forfeit some of the rights or privileges ordinarily appertaining to citizenship, such as the right to vote or hold office. But even these may be restored through the pardoning power of the governor or the President, depending upon the jurisdiction in which the crime has been committed.

Treason

The subject matter of treason is so closely interwoven with allegiance and citizenship that it deserves consideration. Treason is defined by the Constitution as consisting only in levying war against the United States, or adhering to its enemies, giving them aid and comfort. No person may be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court. The statutes provide the penalties—death, or at the discretion of the court, imprisonment for not less than five years and a fine of \$10,000, and the loss of the right of holding any office under the United States. Misprision of treason is defined as having knowledge of treason being committed, and concealing the fact by failing to report it to the President, to the governor of the state, or to a federal or state judge.

Even in time of war the charge of treason is not frequently preferred. Persons engaged in armed rebellion may be guilty of treason (United States v. Greathouse). However, the charge of treason was brought in only a few instances for participation with the South in our Civil War.

Treason may be committed in time of peace. Mere resistance to the execution of a law is not treason. However, it is high treason for armed men to prevent by force the carrying out of an act of Congress as in the Whiskey Rebellion in Pennsylvania in 1794 (United States v. Vigol and United States v. Mitchell).

John Brown, after making his raid on the United States arsenal at Harpers Ferry, was turned over to the state authorities of Virginia. He was placed on trial before a state court, charged with treason against the state of Virginia, convicted, and executed.

It is possible for a foreigner to commit treason. An alien who is residing within a country, enjoying its protection, and owing it a qualified allegiance might on giving open assistance to the enemy be convicted of treason (Carlisle v. United States).

Immigration

Great numbers of aliens have American citizenship conferred upon them annually. Among these the Italians lead, with former subjects of the British Empire next, and Poles, Russians, Germans, and Irish following in order. Only a very small part of the Mexicans admitted to this country are naturalized. Manifestly, we are not assimilating the Mexican immigrants. There has been apprehension that in the case of foreigners from countries with a quota for immigrants, the primary motive for naturalization is to facilitate the coming to this country of wives and children, who are exempted from quota status, and of fathers and mothers, who are given a preferred status. For example, in one year, the quota for Italy was 3,845; the immigration from that country during the year was 19,083.

Three of the executive departments cooperate in the examination of aliens desiring to come to the United States. Consuls from the Department of State have discretionary power in affixing the visa to the immigrants' passports. Surgeons from the Public Health Service in the Department of the Treasury serve as technical advisers in matters of health. They determine whether the prospective immigrant is suffering from an incurable disease, has had one or more attacks of insanity, or is a chronic alcoholic, an imbecile, an idiot, or a prostitute; any one of which is sufficient to bar admission. Immigration officers from the Department of Labor advise the consul as to whether the prospective immigrant is a pauper, a polygamist, or an anarchist, whether he is likely to become a public charge, whether he can read English, or some other language or dialect, whether he is brought in under the contract labor clause, whether he has been convicted of a felony or of a misdemeanor involving moral turpitude, whether he has been deported previously, and whether the immigrant is coming for an immoral purpose. Any one of these is sufficient to bar entry. And the law provides that for the convenience of the immigrant and for the better safeguarding of the interests of the United States these examinations may be made in the applicant's home country. A visa from the consul does not guarantee admission. But the prospective immigrant stands a better chance of passing the immigration authorities in our ports.

At the land-border ports large numbers of rejections occur, largely because an alien may there apply for admission without the immigration visa. But at the seaports steamship companies are subjected to a heavy fine for bringing aliens without proper documents.

Of course the law is at times evaded, but the evasions have been made hazardous. More attempts are made from Mexico than from Canada or Cuba. The automobile and the airplane are used by the smugglers and the government is obliged to exercise elaborate care to apprehend the wrongdoers.

With the exception of countries to be noted later, annual quotas have been assigned to various countries, being "a number which bears the same ratio to one hundred and fifty thousand as the number of inhabitants in continental United States in 1920 having that national origin. bears to the number of inhabitants in continental United States in 1920, but the minimum quota of any nationality shall be one hundred." It was left to the Secretaries of State, Commerce and Labor to determine the facts "as nearly as may be." Statisticians in the Bureau of the Census worked on the problem for nearly five years and admittedly it could not be solved with accuracy. Finally, on July 1, 1929, the quotas were made effective by Presidential proclamation.

The intent was to limit the total as nearly as might be to 150,000. As a matter of fact it is 153,714. The excess is due to the provision of the law that the minimum quota of any nationality shall be 100. Great Britain and Northern Ireland lead with 65,721; Germany, 27,370; Ireland, 17,853; Poland, 6,524; Italy, 5,802; Sweden, 3,314; Netherlands, 3,153; France, 3,086; Czechoslovakia, 2,874, Russia, 2,712; Norway, 2,377; Switzerland, 1,707. And so on down the line with nearly forty countries having the prescribed minimum of 100.

Asiatics of Japan, China, India, Siam, and the islands adjacent are excluded. The countries are not named in the statute, but the degrees of latitude and longitude are so drawn as to encompass these areas.

The nationals of countries in the Western Hemisphere have not

been placed on a quota basis. They might well be, with discretion given to the Secretary of Labor to allow persons from contiguous countries to come in for seasonal employment.

Non-immigrant aliens are those who come in for a temporary sojourn and the visa on the passport so indicates. Even from the excluded areas of China, Japan, and India, professional and business men, government officials, students and travelers with their legal wives and children may enter the United States for a temporary sojourn.

Our immigration law is working smoothly. It is not perfect. It even reflects sectional interests, such as that of Oriental exclusion. Changes will come. Possibly a better selection of immigrants will be authorized on the basis of education and occupational desirability. For example, a petrologist was wanted by one of our scientific organizations. One was located in a European country. His graduate work was completed, his skill was demonstrated, and he was perfectly willing to come, but he would have had to wait approximately three years for his place in the quota. The Secretary of Labor should be authorized to give such persons a preferred status. Large numbers of Europeans desire to enter this country. With only 150,000 admitted annually, the United States could very well exercise greater selectivity.

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CHAPTER XII

Federal Taxation and Expenditure

Among the powers of Congress that are listed in Section 8 of Article 1 is that of taxation. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and Provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States. . . ."

Taxes, Duties, Imposts, and Excises

A tax is a charge levied upon a person or property for the support of government. It does not, like a debt, depend upon benefits received, except that it must be for a public purpose. It is not a toll, depending upon proprietorship, but is a demand of sovereignty.

There appears to be no settled agreement upon the exact meaning of the terms "Taxes," "Duties," "Imposts," and "Excises" as they are used in the Constitution. It is suggested by Cooley on Taxation, that the term "impost" refers to a duty on imported goods and merchandise, but in a larger sense may refer to any kind of tax or imposition, while "duties and imposts" probably cover every tax or contribution not included in the terms "taxes and excises." An excise, he suggests, is an inland imposition on the consumption or sale of a commodity. The Constitution, according to Story, in his Commentaries on the Constitution, apparently uses "duties" as equivalent to "customs" or "imposts." The opinion in Pollock v. Farmers' Loan and Trust Cotakes the position that "In the Constitution, the words 'duties, imposts and excises' are put in antithesis to direct taxes."

The General Welfare

There are a number of limitations upon the power of the fed-

eral government to raise money. In the first place, the power must be used for the general welfare. A "general welfare clause" appears in two parts of the Constitution. In neither instance does it confer upon the federal government a general power to do whatever is necessary for the general welfare of the country. The first appearance of the phrase "general welfare" is in the preamble and, of course, its appearance there does not confer a power, since the preamble is not strictly a part of the Constitution, but only what the word implies, a "preamble" to the Constitution. At best, it may be used in interpreting other parts of the Constitution. The second appearance of the phrase is in connection with the taxing power of Congress, in the clause quoted in the first paragraph of this chapter. There it appears as a limitation upon the power to tax rather than as a grant of power. The power to tax may be used only for the general welfare. The exact meaning and extent of this limitation, however, is not clear. It would appear to hold the federal government in the exercise of its taxing power to the principle that the tax must be for a "public purpose" and not merely for the aid of an individual or a small group. This interpretation was followed in the opinion of the Supreme Court in United States v Butler (the A.A A. decision). However, the federal government does not usually lay taxes for specific purposes. In general, taxes go into the treasury to be used for any purpose for which they may be appropriated. Appropriations, however, are made for a great variety of purposes, and have not been limited to those things over which Congress has legislative power. For instance, while Congress does not have jurisdiction over matters of health, except under the commerce clause, it has appropriated money to provide instruction in maternity and infant hygiene. Enormous sums have been appropriated in aid of improved farming methods, although the federal government would appear to have no legislative jurisdiction over such matters.1

The Use of Taxes to Invade the Rights of the States

Another limitation upon the taxing power was laid down

¹ See p 711

in United States v. Butler when the Supreme Court held the processing taxes of the Agricultural Adjustment Act invalid on the grounds that the taxes were part of a plan to regulate agriculture and thus invade the rights of the states.²

Uniformity of Indirect Taxes

A further limitation upon the power to tax appears in the provision to the effect that duties, imposts, and excises shall be uniform throughout the United States. This uniformity is only a geographical uniformity. That is, the tax must be the same over the whole country. It is not necessary that the tax be the same for different classes of articles or subjects taxed. Different kinds of goods may be taxed differently. An inheritance tax may be graded according to the size of the inheritance. An income tax may vary, likewise, with the size of the income. But whatever the tax may be it must be applied equally to all subjects of the same class within "the United States." The term "the United States" in this sense has been held not to include the "unincorporated" territories of the United States.

Apportionment of Direct Taxes

Still another limitation upon the taxing power appears in Section 2 of Article 1, to the effect that direct taxes must be apportioned among the states according to population, and in the provision in Section 9 of Article 1, which reads: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." The distinction made by economists between direct and indirect taxes according to the "incidence" of the tax is not a sufficient guide to determine the meaning of this term as used in the Constitution. Taxes on land are direct taxes. They have been little used by the federal government. In 1798, a direct tax, apportioned among the states, was levied upon houses, land, and slaves. As a result of the War of 1812, other acts again provided for direct taxes. In 1861, also as a war measure, a direct tax was levied on

³ See p 726

⁸ See p. 252

land and improvements. Some of these acts permitted a state to assume its quota of the tax. Many states took advantage of this provision and thus relieved the federal government of the necessity of collecting from individuals. A federal tax on the circulating notes of state banks has been held to be indirect (Veazie Bank v. Fenno). An inheritance tax has been held to be a "duty or excise," a charge for the privilege of inheriting, and therefore indirect (Knowlton v. Moore).

An income tax upon the income either from real estate or personal property was held direct in Pollock v. Farmers' Loan and Trust Co., on the ground that it amounted to a tax on the land or personalty itself. The tax, because direct but unapportioned, was held unconstitutional. This decision caused much comment, for an income tax, laid during the Civil War, had previously been upheld as indirect (Springer v United States). As a result of the decision in the Pollock case the Sixteenth Amendment was necessary in order to make an income tax, levied without apportionment, permissible.

The Sexteenth Amendment

The Sixteenth Amendment reads: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." The Pollock case had held that a tax on income was, in effect, a tax on the source of the income, and by this reasoning had removed the income tax from the class of excises, duties, and imposts. The effect of the Sixteenth Amendment is to require that the courts look to the income as the thing taxed, disregarding its source. The tax thus is brought within the class of excises, duties, and imposts, and is indirect within the meaning of the Constitution and subject only to the rule of uniformity. Such is the reasoning of the Supreme Court in Brushaber v. Union Pacific Railroad Company.

The Corporation Tax

A corporation tax, though based upon income, was held not subject to the rule of apportionment even before the Sixteenth

Amendment was adopted. This decision was reached in respect to an act taxing both federal and state corporations upon the basis of their incomes. It was held to be an excise upon the privilege of corporate existence, and therefore not subject to apportionment (Flint v. Stone Tracy Co.).

Taxation of State Instrumentalities

A very important limitation upon the power to tax is implied from the nature of the Union. In the case of McCulloch v. Maryland, Chief Justice Marshall laid down the principle that "the power to tax involves the power to destroy," and it was held that a state tax upon a federal instrumentality, the United States Bank, was invalid.

Following the same principle, in Collector v. Day it was held that a federal tax upon the salary of a state judge was unconstitutional, since such a tax would be a burden upon a state instrumentality, its judicial system. On the same grounds, the federal government cannot tax state bonds or the bonds of subdivisions of the state. Neither can it tax the income from such bonds (Pollock v. Farmers' Loan and Trust Co.). Thus, a vast fund is removed from the application of the federal income tax. The rich, especially, are tempted to invest in such securities, in view of the graduated feature of the federal income tax law. Since the tax grows larger with the size of the income, the incentive to invest in tax exempt bonds grows with the size of the income. It would be fortunate for the United States Treasury, and would not seem to involve any serious danger to the independence of state agencies, if the federal government were permitted to levy taxes on the income from state offices and from state bonds, provided such taxes were reasonable and not discriminatory against the state. The case of Collector v. Day really went a step farther than McCulloch v. Maryland, for in the latter case the state tax discriminated against banks not chartered by the state, whereas in Collector v. Day there was no question of discrimination against the state. If, in Collector v. Day, the Court had held the tax valid, since it was reasonable and nondiscriminatory, the states would not have been left unprotected from federal aggression and the application of a graduated federal income tax law would have been simplified. More recently the Court has shown a tendency to restrict the amount of state exemption from federal taxation, and in Helvering v. Gerhardt it upheld the application of the federal income tax to the salaries of employees of the Port of New York Authority, a corporation created by contract between the states of New York and New Jersey, since a nondiscriminatory tax on such employees, not performing an indispensable state function, did not affect the continued existence of the state.

The Salarres of Federal Judges

The federal income tax cannot be collected upon the salary of a federal judge, since it would work as a reduction upon his salary. This would be a violation of the Constitutional provision to the effect that the salaries of federal judges may not be reduced (Miles v. Graham).

Export Taxes

The Constitution specifically prohibits Congress from levying export taxes. Some states, especially the Southern states, exporting staples, were afraid that an export tax might be used to destroy their industries. A stamp tax on bills of lading for exports falls within the prohibition (Fairbank v. United States), but a nondiscriminatory tax upon manufactured articles, even though they are intended for export, is constitutional (Cornell v. Coyne).

Discriminations Against Ports, Clearance of Vessels

Other restrictions upon the taxing power appear in the provision to the effect that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, and that vessels bound to or from one state shall not be obliged to enter, clear, or pay duties in another (Article 1, Section 9).

Taxes for Regulatory Purposes

In some instances a tax has been laid with revenue as only a secondary purpose, while the primary purpose was to regulate

some industry or practice. Sometimes the tax has been so heavy as to be prohibitive, thus bringing in no revenue at all. Most of these taxes have been upheld.

Perhaps the best example in this country of a tax for the purpose of regulation is the protective tariff. The courts will not go into the purposes of a tariff act and hold it invalid because of a protective feature.

In 1886, a tax of two cents a pound was laid upon all oleomargarine, a synthetic butter substitute, although no such tax was laid upon butter. An amendment in 1902 increased this tax to ten cents upon oleomargarine artificially colored to resemble butter, and reduced it to one-fourth of a cent a pound upon oleomargarine not so colored. This tax was so high as to be prohibitive upon oleomargarine artificially colored to resemble butter. However, the Supreme Court upheld the act as amended, in McCray v. United States, treating it as what it purported to be—a revenue measure. The Court held that it could not take judicial cognizance of the intent of the act, though Justice White suggested that where used solely for the purpose of "destroying rights which could not be rightfully destroyed" such "arbitrary act" would be unconstitutional.

In 1910, a similar prohibitive tax was laid upon poisonous phosphorus matches. It was purely a police measure designed to protect the health of workers in an industry which exposed them to the disease known as "phossy jaw." Many match manufacturers desired this legislation, for it would make it possible for them to produce a different kind of match without the necessity of competing with manufacturers of the dangerous variety. The states were not able to cope with the situation, for identical legislation in each state would have been necessary.

In 1914, the Harrison Narcotic Drug Act was passed. It required dispensers to register with the Collector of Internal Revenue, paying a fee of one dollar. Provision was made for order forms for all dealers. Doremus, a physician registered under the act, was charged with having sold heroin to one Ameris; the former had not filled out the required forms, though he had paid the tax of one dollar. He contested the validity of the regulatory feature of the act as having no relation to the tax. In a

five-to-four decision the Supreme Court upheld the act. The Court reasoned (United States v. Doremus) that in the absence of proper records, Ameris might have resold the heroin and the government lost the revenue. Thus the regulatory features of the act were upheld as incidental to the tax feature, although it was apparent from the Congressional debates and the nature of the act that the purpose of Congress in passing the act was to regulate the trade in narcotics. It will be observed that in this act the burden was in the requirement of the use of forms, although it was the tax that gave it validity. It should also be noted that the act was not prohibitory and brought in some revenue. In the oleomargarine case it was the tax that constituted the burden and it was made sufficiently high to discourage or prevent trade in the product, with no object of producing revenue.

In 1919, a tax of ten per cent on net profits for the year was laid upon the employers in certain industries employing chidren within certain ages. A previous Child Labor Act, passed under the commerce clause, had been held unconstitutional. The burden in this measure, as in the oleomargarine law, was in the tax itself. With only one dissenting opinion, the act was held unconstitutional by the Supreme Court (Bailey v. Drexel Furniture Co.). In this case the Court regarded the act as not in reality a revenue measure, drawing its conclusions from the text of the act itself. It was held to be not a tax on a commodity but a mere penalty for departure from a specified method of conducting business. There was no relation between the tax and the number of children employed or the duration of their employment. Passing to broader grounds the Court said: "Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

It should be noted that in the oleomargarine and narcotics cases all the products were taxed, while in the child labor case it was only a part of the articles, those made by child labor, that was taxed. The tax was in effect a penalty upon employers of child labor.

Shortly after this child labor decision another similar act was held unconstitutional. Congress had laid a tax of twenty cents a bushel on contracts for the sale of grain for future delivery, except under circumstances set forth in the act. An exception was made where grain was owned at the time by the seller, or where the sale was effected through a member of a board of trade found by the Secretary of Agriculture to meet the provisions of the act. The Court saw in this a primary regulatory feature (Hill v. Wallace). A later and substantially similar act to regulate dealing in "futures" in grain, under the commerce clause, was upheld (Chicago Board of Trade v. Olsen). In the earlier of these two cases the Court looked behind the words of the act and saw the regulatory feature as its true purpose. As an attempt to regulate under the guise of the taxing power, it was held unconstitutional. In the second case the act, still regulatory in nature, was upheld as a proper exercise of the commerce power.

Power of Taxation Broader in Some Respects than Commerce Power

Despite these various limitations, the taxing power of Congress is in one respect broader than the commerce power. It is not limited to interstate subjects. Commerce must be interstate to be subject to the federal jurisdiction under the commerce clause, but the taxing power can be applied without regard to the interstate or intrastate character of the subject.

The Power to Spend

Distinct from the power to raise money is the power to appropriate. Once the money is in the federal treasury, may it be spent at the pleasure of Congress? It might be argued that an appropriation would be invalid if a tax for the same purpose would be invalid, as, for instance that it must be for the general

welfare. It might also be argued that an appropriation would be invalid if for a purpose over which Congress does not have regulatory jurisdiction, as, for instance, for the public health Whatever these arguments may be, we know that no federal appropriation has yet been held invalid.

An appropriation may be valid where the federal government is morally but not legally bound to appropriate. This question was considered in the case of United States v. Realty Company. The tariff act of 1890 provided for certain bounties upon sugar made from beets or cane grown in the United States or maple sap produced in the United States. Certain manufacturers took action under this statute. Then Congress, in 1894, not only repealed the bounty provisions but withdrew the right to collect bounties that had not yet been paid under the provisions of the act of 1890. As this worked an injustice, Congress, in 1895, provided for payments to be made in cases in which rights to compensation had accrued under the old act. Government officials, however, refused to make payment to certain claimants. on the ground that the bounty provisions of the original act were unconstitutional and that, therefore, the act of 1895, also, was unconstitutional. In its opinion the Supreme Court said that it was unnecessary to pass upon the constitutionality of the bounty provisions. If the claimants had been suing under the provisions of the act of 1890 alone, then, if the provision were unconstitutional, they could not collect. They were, however, suing under the act of 1895, providing for payment of moral or equitable claims that had accrued under the older statute. The act of 1895 was held valid as providing payment for a moral obligation. The Court added: "It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises."

A more recent case (Massachusetts v. Mellon and Frothingham v. Mellon) involving the validity of a federal appropriation arose under the so-called Maternity Act of 1921. The federal government appropriated a sum of money to be used in conjunction with

a similar appropriation by any state for the purposes of promoting the welfare and hygiene of maternity and infancy. If the appropriating power of Congress may be used only for subjects over which Congress has regulatory powers, this act would appear to have been unconstitutional, unless by a long stretch of the imagination it could be brought under such a power as that of raising and supporting armies, on the ground that a healthy citizenry is needed to insure an effective army. The validity of the act was contested in an injunction suit brought by the state of Massachusetts on behalf of its citizens, and a similar suit brought by a taxpayer, Frothingham. The cases were considered together in the Supreme Court. The Court refused to take jurisdiction, holding that the powers of the state of Massachusetts had not, as alleged, been invaded, since the statute imposed no obligation upon the state but merely extended an option to take advantage of the appropriation. The Court also pointed out that the tax feature of the act fell upon the taxpayers and not upon the state itself. Therefore, the state could not sue in its own behalf. Neither could it sue as parens patriae on behalf of its citizens, for the tax of the federal government was being laid upon the taxpayers as persons subject to the jurisdiction of the United States and not as citizens of a state. In this capacity it was only the United States that could represent them as parens patriae. As for the claim of Frothingham, the Court held that she did not have a direct and immediate interest in the matter sufficient to sustain a taxpayer's action. The interest of a taxpayer of the United States "in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." To permit this suit would open the way to innumerable suits to enjoin federal expenditures. The Court did not pass upon the major issue of the validity of the act. The grounds upon which it refused to take jurisdiction were so broad, however, that it would appear to be difficult to prepare a case involving a simple

appropriation over which it would take jurisdiction. At any rate the decision is evidence of a reluctance on the part of the Court to hold any federal appropriation unconstitutional.

If it should ever be held that Congress cannot appropriate except for an activity over which it has regulatory jurisdiction, many of the present activities of the federal government must be brought to an end. Most of the work of the Department of Agriculture is based purely upon the appropriating power of Congress. The federal government has no regulatory powers over agriculture, except where products enter interstate commerce, but it does appropriate vast sums to study the problems of agriculture and disseminate information based upon these investigations.

In addition to the maintenance of these federal agencies, other sums are given to the states, usually upon condition that the state contribute an equal sum.

One of our early political controversies involved the question of the use of the federal appropriating power. With the expansion of population into the West, the settlers in the regions beyond the Alleghenies, under the leadership of Henry Clay, proposed that the federal government should build roads linking these new settlements with the East. This demand for "internal improvements" was linked with a protective tariff policy that was intended to insure the support of the manufacturing states as well as to raise the necessary revenue. This was Clay's "American System." Opponents of the plan rallied under the banner of "states' rights," setting a precedent for opposition to subsequent federal expenditures of this nature as well as to other forms of federal expansion. Opposition may have delayed and restricted the expenditures but it did not prevent them, and appropriations for road building and for improvement of water communications have been at times among the heaviest of federal expenditures.

In 1862, Congress instituted a system of federal aid to colleges of agriculture and mechanic arts. This has been expanded into a broad program of aid in agricultural and vocational education.4 In recent years federal aid, both in the form of grants to the states and direct grants and loans to individuals, has been extended on a vast scale. Often these grants are made subject to

^{*}See pp 711, 735.

conditions which must be met by the state or individuals receiving them. In this way the federal government secures regulatory powers over matters which normally would not be subject to its jurisdiction.

Proponents of states' rights are alarmed at the possibilities that lie in the new federal policy of aid to the states. The grant-inaid is one of the most effective as well as one of the most insidious means by which a central authority can exercise control over nominally independent local governments. The central government merely exercises a control where the state chooses to accept the federal grant. The state may refuse the grant but it cannot prevent the collection of taxes from its own citizens and their application to grants for other states. State pride is not sufficiently strong in any section to overcome the impulse of self-interest to accept the grant. With acceptance of the grant goes such regulation as the federal government may choose to impose. This control is exercised over even the state's appropriation in the case of a joint sum. In England, a policy of grants-in-aid for certain purposes by the central government has become one of the most effective means by which the central authorities exercise a strict control over nominally independent local governments. It has been proposed in the United States that the federal government assist the states in the maintenance of their schools. Such a policy almost certainly would be accompanied by regulation. It could easily lead to a uniform system of education in this country. The advantages of such uniformity are evident, but before adopting a policy of federal grants the almost irresistible tendency toward federal control should be considered.

Taxes Based on Regulatory Powers

It has been observed that the power to tax may involve an incidental power to regulate, and the power to spend money may be exercised in such a way as to involve regulation. It is also true that the power to regulate may involve a power to tax. For instance, the "resulting" power to control the currency carries a power to tax the notes of state banks out of existence (Veazie Bank v. Fenno). The control of immigration carries a power

to collect a levy from the masters or owners of ships of fifty cents a head for each alien brought in (Head Money Cases). The requirement of a stamp on packages of exported manufactured tobacco was held not to be an export tax within the Constitutional prohibition, where the stamp was inexpensive and obviously intended to prevent fraud in connection with the internal revenue laws. It was a charge for the expense of administration (Pace v. Burgess).

Customs Dutres

The greatest source of federal income in the past has been the tariff upon imports. It is theoretically true that a high tariff may bring in a smaller revenue than a low tariff. However, the high tariffs for protective purposes have at times brought in such a huge revenue that money has been available for purposes that might not otherwise have been conceived. The tariff act of 1816 is often considered the first of our protective tariffs. That of 1824 certainly was of a protective nature. The Morrill tariff of 1861 marked the beginning of a high tariff policy. It was followed by other acts increasing duties and designed to secure the means for carrying on the Civil War. After the close of hostilities the high duties were retained, however, and with the great economic expansion of the country and increased imports, a revenue was obtained which was disposed of only through expenditure upon such things as the development of waterways and harbors and a system of pensions for soldiers. The high tariffs of this period were of a "protective" nature, with the avowed purpose of putting our "infant industries" upon a parity with foreign competitors and of relieving highly paid American workmen from competition with cheap foreign labor. The Democratic party in the South, in general, opposed the policy of a high protective tariff. Its great staple, cotton, needed no protection, while as a consumer of imports, the South wanted a low tariff. At the present time, the growth of industry in the Southern Appalachians and the diversification of Southern agriculture have changed the situation. The South desires protection for its manufactures and for its new crops. It is likely that the tariff will remain for a long time a chief source of federal revenue.

The determination of tariff rates is a legislative function. The tariff act of 1890 provided for the free importation of certain articles, but authorized the President to suspend this provision and apply certain duties fixed in the act, in the case of goods from any country that imposed exactions and duties on our products, that the President deemed to be reciprocally unequal and unreasonable. In the case of Field v. Clark the constitutionality of this provision was contested on the ground that it was an attempt to delegate legislative and treaty-making power to the President. The Supreme Court held that it was not a delegation of legislative power. Congress had fixed the rate. The President merely determined certain facts, and if such facts were disclosed, he was bound to proclaim them, upon which proclamation the duty was applied by previous determination of Congress in the act. Thus the doctrine of the separation of powers was preserved by the Court Similarly the Court upheld more recently the "flexible" provisions of the tariff act of 1922, which authorized the President to fix new rates upon imports, not to exceed fifty per cent higher than or lower than those named in the act, in order to equalize the differences between the costs of production here and abroad (Hampton v. United States).

To assist the President and Congress in determining rates, the Tariff Commission was established in 1916. President Taft had previously appointed a Tariff Board, but it had expired within a few years through failure of its appropriation. The present Commission consists of six members, appointed by the President by and with the advice and consent of the Senate, for terms of six years. Not more than three members may be of the same party. The Commission determines the economic effects of the various customs rates and reports upon them. Optimistic persons had hoped that through this commission a "scientific" tariff might be established. The effects of tariffs, however, are so far-reaching and play so important a part in the development of industries and sections of the country that it is not likely that the tariff will soon be entirely removed from politics. The value of the Commission lies in furnishing information which may be used by Congress and the President in reaching their conclusions. In the tariff act of 1930, the Commission was given power to recommend to the President increases or decreases in tariff duties, not to exceed fifty per cent of the rates fixed in the act, in order to meet differences in the cost of production between this country and other countries. The President was given power to approve such changes and proclaim them, provided in his judgment they were needed to meet such differences in the cost of production.

The most recent development in relation to customs duties is the provisions for foreign trade agreements. An act of June, 1934, granted to the President authority to enter into foreign trade agreements with foreign countries and to proclaim such modifications of existing duties and import restrictions as are required to carry out such agreements. However, no duty may be increased or decreased by more than fifty per cent and no article may be transferred between the dutiable and the free lists. The flexible tariff provisions of the act of 1930 are made inapplicable to any article upon which the United States has a foreign trade agreement. The powers of the President to make foreign trade agreements were, according to the original act, to expire at the close of three years, but they were later extended for another three-year period.

The powers thus granted to the President are an extension of two powers formerly exercised by him. The first is the power to make agreements with foreign countries without the necessity of resorting to a treaty requiring a two-thirds vote in the Senate. The validity of executive agreements has been questioned, but they have at least been sanctioned by practice. The other extension of power 1s from the principle of the flexible tariff provisions. There is this difference, however. The flexible tariff law had set a criterion by which the President was to be governed, that is, the equalization of costs of production. Theoretically the President's function was one of fact-finding, and the obligation to proclaim changes in the tariff was binding upon him as soon as differences in the cost of production were discovered. The flexible tariff provisions do not include such definite criteria; they give only a very general statement of the purpose of increasing trade and national well-being by removing burdens and restrictions upon such trade.

The practical effect of such agreements is, first, to remove cus-

toms duties somewhat from the arena of Congressional logrolling, and, second, to permit a lowering of tariff rates upon the basis of reciprocal concessions by foreign countries. The plan tends to centralize power in the executive, but it seems to be the only practical way yet devised for escape from tariff laws which are condemned by the very men who vote for them on the basis of local demands.

A large number of reciprocal agreements have been drawn up under these provisions. In the process the President, operating through the State Department, makes use of studies conducted by the Tariff Commission, the Bureau of Foreign and Domestic Commerce, the Department of Agriculture, and any other departments or independent bodies that he may care to consult. A number of interdepartmental committees have been set up to aid in coordinating the work of the various bureaus that are concerned in these investigations.

Except as limited by "flexible" tariff provisions or by those in respect to reciprocal tariff agreements, the tariff rates are originated in the House Committee on Ways and Means and the Senate Committee on Finance. The membership of these committees is determined primarily by seniority and political considerations, with little regard for personal qualifications. As a tariff bill is a political measure, the minority members are likely to have little influence. Public hearings are held at which any interested person may appear and give testimony. The hearings are hurried and the testimony disordered, irrelevant to essentials, and untrustworthy. As a matter of fact nearly every important industry or interested group has some sort of lobby in Washington to look after its interests in the framing of tariff bills. Members of Congress themselves plead the interests of their constituencies. The pages of the Congressional Record are swelled with speeches and the Appendix grows with those that could not be delivered. The bill as reported by the House committee is put through the House under cloture, giving the minority little time in which to express its objections. The Senate may amend the bill to the extent of virtually writing a new one. Usually the duties are raised, for this seems to be the easiest way to quiet opposition. Then the measure goes to a conference committee, which usually brings out a compromise that is almost certain to pass. The country is likely to be disappointed with its provisions.

Why is a tariff bill likely to be unsatisfactory? The answer is to be found in the manner in which it is drawn up. Since a member of Congress is concerned primarily with the opinions and interests of his own constituency rather than those of the whole country, he will vote for a bill that gives his constituency what it wants even while condemning the bill as a whole.

Internal Revenue

As a means of producing revenue the customs duties are now surpassed by the internal revenue duties. This is due to the income taxes made possible by the Sixteenth Amendment, which became effective in 1913, and to the corporation taxes. The incomes of all persons and corporations are now, in general, subject to taxation. Exceptions are the income of the state or its subdivisions (cities, counties and the like), the salaries of officials of the state or its subdivisions, and income derived from obligations of the state and its subdivisions. These are not taxable by the federal government, since such a tax would interfere with the independence of the state.⁵ Where officials are not performing indispensable state functions apparently they are subject to a nondiscriminatory federal income tax. Moreover, where a state enters into private business its income from that business is taxable. Thus, when South Carolina entered into the business of dispensing liquor, the state was held to be subject to a federal license tax (South Carolina v. United States). If a city goes into the business of manufacturing gas or operates a street car line, its income therefrom and the salaries of its employees in those enterprises are taxable. Federal employees are subject to the tax, with the exception of judges and the President, who are exempt because of the Constitutional prohibition against reduction of their salaries.

The federal income tax law is graduated according to the amount of the income. Married persons with incomes up to an

⁵ See p 227

amount fixed in the act are exempt upon this amount. Unmarried persons are given an exemption of something less than half that of married persons. For instance, an exemption of \$2,500 for married persons in a recent act carried an exemption of \$1,000 for unmarried persons. An additional exemption is granted for children or other dependents. The lowest taxable incomes are taxed at a low rate and as the income becomes larger the rate becomes higher. An incidental effect of this is that persons with large incomes are tempted to invest in state and municipal bonds in order to escape the high federal tax. Large sums of money are thus lost to the federal government.

In collecting the tax, the sworn statement of the individual concerned is used as a basis in most cases. Sometimes this statement may be checked at the source of the income. For instance, a statement from the employer can be used to verify the statement of the individual as to his income. Under some circumstances the law calls for the collection of a tax at the source, that is, the tax may be deducted by a corporation from dividends of the individual.

Another form of internal revenue is the tax upon alcoholic beverages. Under prohibition this was reduced to insignificant proportions, but with the repeal of the Eighteenth Amendment it has regained a place as an important source of income. The tobacco tax also is a large source of revenue. Among the large sources of income at the present time are receipts derived from special taxes such as those under the Social Security Act.6 Although taxes under the Social Security Act are intended to meet the purposes of that act, the funds thus acquired are not "earmarked" but may be used for other purposes. It appears that under present policy the funds are being used to meet current expenses, leaving obligations under that act to be met by future taxation as need arises. During the Civil War and during the World War, taxes were laid upon a great variety of subjects. Amusements, legal instruments, and various luxuries were included in these extraordinary taxes. Some of them are now in use, presumably as emergency measures.

The Post Office Department derives a large income from the carrying of letters and parcels, but this normally is more than

⁶ See p 676

offset by the expenses of the department. Minor sources of revenue are fees, such as charges for copyright registration, licenses, income from public lands, profits on coinage, fines, the immigration head tax, Panama Canal tolls, and other miscellaneous charges. The greater part of the federal income is collected by the Treasury Department through either the Bureau of Customs or the Bureau of Internal Revenue.

The Bureau of Customs is the agency for collection of customs duties. The country is divided into customs-collection districts, each under a collector of customs. The customs officials at our ports of entry must be skilled in the classification of the innumererable varieties of articles that enter our ports from abroad. They must be quick to estimate the value of a great variety of articles and to detect frauds and efforts at concealment.

The Bureau of Internal Revenue collects the income tax, the inheritance tax, the taxes on liquor and tobacco, and all the other taxes that go to make up the "internal revenue." Such regulatory tax laws as the oleomargarine act, the white phosphorus match law, and the narcotics law are enforced by this bureau. The country is divided into internal revenue districts, each under a collector, who is assisted by deputy collectors. Among the most difficult of the problems of this service is the detection of concealments and misstatements under the income tax law.

Federal Depositories

All revenues are turned into the federal Treasury. Early in the history of the country the United States Bank was used as a depository. For some time after this bank was destroyed by President Jackson the funds were deposited in various private "pet" banks. Later, the subtreasury system was inaugurated and subtreasuries, in which funds were kept in vaults and withdrawn as needed, were established over the country. With some modification this rather primitive system remained in force until some years after the Federal Reserve System was established. At present, the Federal reserve banks and the member banks of the Federal Reserve System are used as depositories of national funds.

The Federal Budget

Up to the Civil War the revenues of the United States were not very large and the problem of expenditure was a comparatively simple one. A single committee, Ways and Means, in the House of Representatives, took care of appropriation bills as well as revenue bills. In 1865, with mounting expenditures, the power of appropriation was taken from the Committee on Ways and Means and given to a Committee on Appropriations. In time, other committees acquired power to report appropriation bills concerning the matters over which they had jurisdiction. Each committee, ambitious for its own sphere of activity, was under the impulse to secure larger appropriations, and even though the leaders of the houses acted as a restraining influence, lack of coördination and logrolling tactics contributed to a wasteful financial system. In addition, there was too little relationship between revenues and expenditure.

Our budgetary system of this period was directly in contrast with that of Great Britain, where Parliament does not raise the figures of appropriations set by the cabinet and seldom lowers them. The responsibility for both the raising and spending of revenue rests upon the Crown and this in effect means the cabinet.

In 1921, the Budget and Accounting Act laid the basis for a complete revision of our revenue raising, appropriating, and accounting system. A readjustment of the committee system in Congress did much to complete the new structure.

Under the new legislation we now have a Bureau of the Budget in the Treasury Department. There was some controversy over the wisdom of placing the Bureau in any department. As it would have supervision over the expenses of the Treasury Department as well as over those of the other departments, it was argued that it should be made independent of any administrative authority other than the President. In fact, in actual practice, the Budget Bureau has developed as an independent bureau with only a nominal subordination to the Secretary of the Treasury. At the head of this Bureau is the director. The first director of

⁷ See p. 98.

the budget was General Dawes, later Vice-President. The director is appointed and removed by the President alone without the advice and consent of the Senate. This places upon the President the complete responsibility for the policies embodied in a budget. To the Bureau of the Budget the various departments and independent establishments send the estimates of expenditures which they deem necessary for the coming year. These may be accepted, reduced, or raised by the Bureau. With all the estimates before it the Bureau goes into them carefully. Where a department has laid plans for expansion in any field the Bureau will investigate to determine whether the expansion will fit into the general financial program. An effort to cut down expenses is usually made. Having determined upon the figures for all departments and independent establishments, they are sent on to the President, together with other financial reports, including the estimated revenue under existing laws and under any new laws that the Bureau may propose. All of this work is done under the direction of the President, who forwards the budget to Congress.

If Congress followed the British model, it would pass the budget bill virtually unchanged. Thus the responsibility for the financial well-being of the country would be placed squarely upon the President. But there is a difference between the position of Congress and that of the British Parliament. The cabinet in England is the choice of Parliament. If the two are not in agreement upon policies, there must be chosen either a new Parliament or a new cabinet. If a budget should be changed materially the ministry (that is, the cabinet and certain other officers) would either resign or have Parliament dissolved. In this country there is no likelihood that a President will resign under these circumstances, and he could not dissolve Congress. Congress remains independent of the President but cannot compel him to resign. For this reason it is not likely to abdicate its power by accepting unchanged so important a measure as the budget bill. Congress insists upon a careful scrutiny of the budget proposals and prides itself upon the improvements it makes. It may reduce the total expenditure while raising particular items, or make such other changes as it desires. The plans of the Budget Bureau, however, serve as a guide and have been followed very closely by Congress up to the present time. It should be noted, however, that when the President and Congress are of different political parties or when the majority party in one or both of the houses of Congress is not inclined to accept the President as its leader, differences are likely to be greater than in normal times.

Appropriation bills normally go into great detail as to the way in which the money is to be spent. In England, there is considerable flexibility in the appropriations, thus making it possible for the financial officers to transfer sums, within certain limits, from one item to another. In recent years, our own Congress has gone to the other extreme in relation to emergency appropriations for the relief of distress. Enormous sums in the form of "lump-sum" appropriations have been granted to the President with practically no limit upon their use. The lump-sum appropriation may be regarded, however, as a temporary expedient to meet emergency conditions.

The budget system of 1921 would not have been complete without a revision of the committee system of Congress. Without going to the extreme of concentrating revenue-raising and all appropriating powers in one committee of each house, the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate were left unchanged, while power to report appropriation bills was concentrated in the Committee on Appropriations of each house. An exception to this practice is in relation to claims, which are reported by the committees in charge of claims against the government as direct appropriations in both houses. With this exception the raising and spending of money is considered in only two committees of each house, one for raising revenue and one for appropriations.

The Comptroller General

Another phase of the Budget and Accounting Act was the establishment of a General Accounting Office under the direction of a Comptroller General. He is appointed by the President with the advice and consent of the Senate for a term of fifteen years, and is ineligible for reappointment. The Director of the Budget

was placed under the complete control of the President, in conformity with the idea that the President was to be made responsible for the budget On the other hand, Congress desired to retain a supervision of the expenditure of the money to the extent of seeing that it was spent in accordance with law. The Comptroller General, therefore, was by this act made not subject to removal by the President He was made removable only by impeachment or by joint resolution of Congress for cause, and after notice and a hearing. Under the case of Myers v. United States 8 it would appear, however, that this provision is subject to question from the point of view of constitutionality, since it attempts to limit the power of the President to remove an administrative officer. It is the duty of the Comptroller General to see that moneys collected by federal officers and deposited in the Treasury are placed upon the correct accounts. More important than this, however, he passes upon the legality of payments of money out of the Treasury. He is the watchdog of the Treasury so far as the legality of expenditures is concerned. His office has become a storm center in official Washington. Officials who have incurred expenses and find that these are not approved by the Comptroller's office, leaving the officials to meet the expenses from their own pocketbooks, do not look with entire approval upon the Comptroller's office. If, however, the Comptroller General is to be the representative of Congress, checking the illegal expenditure of money by administrative officers, he must be independent of all officials from the President down. Another important duty of the Comptroller is to supervise the accounting systems of the various services.

It is in respect to his control of expenditures that there has been the greatest amount of discussion concerning the Comptroller's office. Under the existing practice a disbursing officer who contemplates making an expenditure may follow either of two procedures. He may make the expenditure and wait for the final audit of the Comptroller. If, upon making the audit, the Comptroller finds that the expenditure was illegally made, the Treasury is reimbursed from the disbursing officer's bond. The disbursing officer may then attempt to secure a return of the money from

⁸ See p 156

the persons to whom it was paid, and settle with his bondsmen. On the other hand, the disbursing officer, having doubts upon the legality of a proposed expenditure, may hold up the payment, and request a pre-audit from the Comptroller, that is, an audit prior to payment. A decision by the Comptroller in such pre-audit is binding upon himself in making final settlement. Another alternative before making payment is for the disbursing officer to request an advance decision, without an actual audit of the account, upon the legality of such a proposed expenditure. Department heads may request such advance decisions before they have incurred the proposed obligation. Such advance decisions also are binding upon the Comptroller when he subsequently makes the final settlement or post-audit. The objection to advance decisions and pre-audits lies in the delay that must ensue in making payment.

Among the proposals of the President's Committee on Administrative Management in connection with administrative reorganization was the reorganization of the work of the Comptroller's office. The President's Committee suggested that the present setup fails to place authority in the hands of the President, who according to the Committee, needs greater authority in order to carry out the Constitutional injunction that he take care that the laws be faithfully executed. The Committee proposed that the office of Comptroller General be abolished and that in its place there be set up an Auditor General whose duties would be limited to a post-audit. The post-audit would determine whether, in the opinion of the Auditor General, funds have been spent in accordance with law. The Auditor General would not have actual power to disallow expenditures, however His functions would be limited to a report to Congress expressing his opinion upon the validity of expenditures. The power of approving or of disallowing expenditures would be transferred to a bureau within the Treasury and this bureau would exercise control through a current pre-auditing system. Questions of law would be referred to the Attorney General. Thus the President would control expenditures through the Treasury Department. Congress would be informed by the Auditor General of illegal expenditures after they had been made, but would have no actual control of expenditures such as it now possesses through a Comptroller General who is independent of Presidential control. This recommendation for the reduction of the power of the Comptroller General and a corresponding increase in the power of the President was not supported in the report of the Brookings Institution which was made for a Congressional committee at about the same time as that of the President's Committee. The proposals of the Brookings Institution did not seriously disturb the existing organization, although suggestions for improvement were made.

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CHAPTER XIII

The Territories

The Powers Under Which Territory Is Acquired

There is no express Constitutional authorization under which the United States can acquire territory, although the power to do so might be implied from Article IV, Section 3: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."

Other than in the implications of this clause the United States probably possesses the power upon several other grounds. In the first place, as a sovereign state it may presumably exercise such powers as have always been regarded as belonging to independent countries, one of which is the right to acquire territory. Moreover, under the treaty-making power it may be assumed that it was intended by the framers that the United States should have power to accomplish the ends for which treaties customarily are made, and one of these is the disposition of territory. Again, under the war power it might well be assumed that one of the most common results of war can be attained Furthermore, the power to add new states to the Union has, as a matter of history, been used to extend the boundaries of the United States.

The Means by Which Territory Has Been Acquired

The powers under which territory has been acquired are to be distinguished carefully from the means by which this has been done. The means by which territory has been added have, in fact, been as various as the powers. By far the greatest areas have been acquired by treaty. The Louisiana Purchase and the

vast area taken from Mexico as a result of our war with that country are examples.

Acquisition by joint resolution is another device with an interesting history which has been used in the territorial expansion of the United States. After Texas broke off from Mexico and formed an independent state, a treaty was negotiated which would have brought it into the United States as a territory. Opposition in the Senate prevented this treaty from receiving the necessary two-thirds vote. There was, however, a majority for annexation in the Senate as well as in the House of Representatives and it was recalled that the accepted plan for bringing new states into the Union was through a joint resolution, requiring, of course, only a majority vote and the President's signature. Texas, therefore, was brought into the Union as a state by joint resolution. It did not pass through the usual "territorial" status. Later, when a treaty was negotiated to bring Hawaii into the Union as a territory, it was discovered that it, too, could not get a two-thirds vote in the Senate. And so, like Texas, Hawaii was brought in by joint resolution, for again there was a majority for annexation in each house although there was not a two-thirds majority in the Senate. It is to be noted, however, that Texas was brought in as a state while Hawaii entered as a territory.

Another method of acquisition that may be considered distinct is found in the case of the Oregon country, where discovery, exploration, and occupation gave us what we considered a prior claim, which claim became recognized upon the conclusion of a boundary treaty with Great Britain.

In a few instances territory has been added by Presidential action under a simple act of Congress. An act of Congress provided for the extension by the President of the jurisdiction of the United States over unoccupied guano islands. When a murder was committed on an island which had been taken over under this act, it was held in Jones v. U.S. that the existence of sovereignty over a territory was a political question upon which the decision of the executive and legislative branches would be binding upon the courts.

In one instance, that of American Samoa, our claim until re-

cently would seem to have been based upon a simple agreement between the President and certain Samoan chiefs, although this had been preceded by a treaty of division with Great Britain and Germany by which we had acquired their claims to these islands.

Incorporated and Unincorporated Territories

The government of our territories has presented some difficult questions, both from the political and the constitutional points of view. The continental territories contiguous to the old states did not cause great difficulty. It was certain that they would be settled mostly by people who were accustomed to American principles of government. The laws of the old states could be transplanted to them and the principles of relationship that had existed between the old states and the central government could be applied to them without offending their political traditions and without straining their capacity for self-government. The almost uninhabited territory of Alaska did not present very difficult governmental problems. When peaceful annexation and conquest brought Hawaii, the Philippines, Puerto Rico, and other noncontiguous islands within our political jurisdiction, however, serious problems did arise.

These islands were inhabited by a native Indian, Polynesian, or Malayan population, mixed with Spanish and other races, although in Hawaii there was a considerable American element. Obviously, certain provisions in the Constitution limiting Congress and setting up guarantees that to Anglo-Saxons were sacred, such as the wide use of jury trial, were not applicable to these people. Moreover, geographical and economic considerations made it questionable whether Congress should be limited in these islands as it was in the contiguous territories.

Congress was confronted with a difficult problem. If it should apply all the guarantees of the Constitution, the new governments would not be adapted to the people for whom they were intended. On the other hand, any other type of government might be unconstitutional. "Does the Constitution follow the flag?" This question was brought before the courts in a series of cases known as the Insular Cases, and the decisions marked out the course that Congress might pursue.

The most important of the Insular Cases was that of Downes v. Bidwell, which involved the constitutionality of certain provisions of the Foraker Act levying duties on goods entering the United States from Puerto Rico. As the Constitution provides that "all Duties, Imposts and Excises shall be uniform throughout the United States" (Article I, Section 8), these provisions were invalid if Puerto Rico was a part of the United States within the meaning of this clause. It was held, in a five-to-four decision, that the act was valid. The five judges who concurred in this decision were not unanimous in their reasons. One of them, Justice Brown, held that the Constitutional limitation applied only to the states. His reasoning implied that Congress was free to legislate as it pleased for any of the territories so long, at least, as fundamental rights were not infringed. Three, if not four, of the judges of the majority held that there are two types of territory, those that have been "incorporated" into the United States and those not so "incorporated." The latter are merely "appurtenant" to the United States. In the incorporated territories the limitations upon Congress apply just as they do in the states. In the unincorporated territories, however, only the fundamental limitations apply. Those limitations that are "mere regulations as to the form and manner in which a conceded power may be exercised" do not apply. Just what constituted the fundamental limitations the Court did not attempt to enumerate, but in this instance uniformity of taxation was held not fundamental. Incorporation, according to this opinion, takes place by action of Congress, either express or implied. The distinction of these judges between incorporated and unincorporated territories has been concurred in by later decisions, so that it is now recognized as law. In the later case of Hawaii v. Mankichi the Constitutional provision for indictment by grand jury and trial by petit jury was held not fundamental. A further result of the conclusion that some territories are "appurtenant" to, but not part of, the United States is that citizens of such territories are "nationals" but not citizens of the United States unless made so by special act.

It will be noted that in the earlier decisions it was indicated that incorporation might be implied. This question came up again in the more recent case of Balzac v. Porto Rico, which in volved the question whether Puerto Rico had been implicitly incorporated when United States citizenship was conferred upon its people. In this case, however, it was stated in the opinion of the Court that while formerly incorporation might have been implied from acts of Congress, this was not now the case. The Court took the position that the distinction between incorporated and unincorporated territories had been set forth long enough and had been sufficiently emphasized for Congress to be familiar with it, and that it was reasonable to presume that if Congress intended to incorporate a territory it would do so expressly or with an implication so strong as to exclude any other view. Thus, it seems that the Supreme Court now will hold a territory unincorporated until Congress has put its intention in clear and unmistakable terms.

While incorporation can take place only by action of Congress, it does not follow that that body has power to revoke its act. Once a territory has been incorporated it would appear that that status can not be taken away from it. When the mantle of the Constitution has been thrown around a territory no action of Congress can remove its protection. This constitutes an exception to the rule that no political act of a legislative body can bind its successors.

Territories Now Held Incorporated

At the present time the only incorporated territories are Alaska and Hawaii. The District of Columbia is a special district with a status similar to that of a state in many respects and without question has been "incorporated" into the United States. Alaska was held incorporated in Rassmussen v. United States. The act of April 30, 1900, concerning Hawaii, provides that, "The Constitution. . . shall have the same force and effect within the Territory of Hawaii as elsewhere in the United States." Thus, by specific action of Congress Hawaii is given the status of an incorporated territory.

Respects Under Which All Territories Are at a Disadvantage

There are some respects in which the inhabitants of even incor-

porated territories are denied Constitutional guarantees that are given to the citizens of the states. One of these is in respect to the courts. The system of territorial courts is a part of the governmental structure, created by Congress under its power to govern the territories. Therefore, territorial courts are not a part of the "judicial power of the United States" as defined in the third article of the Constitution. It follows that the restrictions of the third article do not apply to them. It is not necessary that the judges of the territorial court serve during good behavior. They may be given limited terms (American Insurance Co. v. Canter). Where courts with the powers of District Courts of the United States are set up in a territory they are not true United States courts within the meaning of Article III, but in reality are territorial courts (Balzac v. Porto Rico), although frequently they are erroneously referred to as United States District Courts. It is true that a state may, and most states do, provide limited terms for their judges, and thus are not different from the territories in respect to purely local courts. However, federal district courts in the states are set up under Article III and the judges must have tenure during good behavior, and it is in this respect that the states enjoy a Constitutional guarantee not extended either to incorporated or unincorporated territories.

Another respect in which an incorporated territory is on a different footing from that of a state is in the matter of the jurisdiction of the federal courts. These courts are given by the third article jurisdiction over cases between citizens of different states. A citizen of a territory, however, is not a citizen of a state, and he cannot sue or be sued in a federal court under this provision (Hooe v. Jamieson). If a citizen of the state of Maryland should drive his car into the state of Virginia and there collide with the car of a citizen of Virginia, a suit might result which could be carried into the courts of the United States on the grounds of diverse citizenship. If a citizen of the District of Columbia (which has in this respect the same status as that of an incorporated territory) should drive into Virginia and have a collision with the car of a citizen of that state, no suit could result that might be carried into the federal courts on the grounds of diverse citizenship. It would not be a suit between citizens of

different "states." The courts of Virginia would have jurisdiction and the man from the District of Columbia would have to content himself with the courts of his opponent's state without the opportunity to resort to the presumably more impartial courts of the United States.

This does not mean, of course, that a citizen of a territory cannot sue in the federal courts on other grounds. If a "federal question" is involved his case can be taken to the federal courts to the same extent as can other such cases. His disadvantage is limited to the inability to take cases to the federal courts on the grounds of diverse citizenship. In controversies between citizens of territories or the District of Columbia and the citizens of states, the local courts must be used if a "federal question" is not involved.

The Acquisition of Land

To the various methods of acquiring territory discussed above by which the area of the United States has been extended should be added the methods by which the federal government may acquire land from the states. The latter methods do not lead to an increase in the total area of the country, but at the most constitute a transfer of jurisdiction from the states to the federal government.

Most of the territory west of the Alleghenies as far as the Mississippi was taken over under cessions from the original states. The express provision in Article I, Section 8, to the effect that Congress shall have power "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," has been utilized in the acquisition of the District of Columbia and various other tracts. In some instances properties have been acquired without the consent of the state legislature. It has been held that this is permissible, and that such properties are exempt from state taxes (Van

Brocklin v. Tennessee). They are exempt from any state action that will destroy or impair their use for the purposes of the United States. At the same time the legislative authority and political jurisdiction of the state remain otherwise unimpaired (Fort Leavenworth Railroad Co. v. Lowe).

Congress may not only purchase property within a state without its consent, but it may even do so under the power of eminent domain if the property is needed by the United States in order to carry on its functions. Where Congress possesses a power it cannot be restricted in its exercise either by the unwillingness of property holders to sell or the prohibitions of the state (Kohl v. United States). Congress evidently may go farther and authorize corporations to exercise eminent domain within a state (Cherokee Nation v. Kansas Railway Co.).

Areas owned by the United States, but acquired without state authorization, are not, however, strictly "territory" of the United States. They are properties owned in like manner to any other proprietor, except that the state may not interfere with their use for the public purposes of the United States.

THE ORGANIZED TERRITORIES

Our Colonial Empire

Of all the world powers of history the United States has acquired the smallest amount of foreign territory. We have not built up a great empire through the conquest and subjugation of distant peoples. Powers of the past, in search of spoils or tribute or trade, have gone into countries already occupied by other civilizations and reduced them to subjugation, or have sent out colonizing expeditions into distant unoccupied territories. The foreign territory of the United States is small in extent.

This does not mean, however, that we have not been a colonizing nation. The territorial expansion westward from the thirteen original states over the Alleghenies to the Mississippi, along the Pacific, and from the Mississippi to the Rockies was one of history's greatest colonizing ventures. But this was an expansion into contiguous and for the most part virtually uninhabited country. It was not a foreign conquest, except in so far as the defeat

of Mexico opened up to us a part of the area. Our energies were absorbed in this internal expansion. Nevertheless, we have acquired a colonial empire of considerable proportions and value.

The Organized Territories

The term "organized territory" has no clear definition, but it is applied to those territories that have been given a local legislature and a degree of autonomy. The "unorganized" territories are governed by the President through the Navy Department, the War Department, or the Department of the Interior. Alaska, Hawaii, the Philippines, and Puerto Rico are classed as organized territories. It must be remembered that this distinction is entirely distinct from the differentiation between incorporated and unincorporated territories. The only incorporated territories are Alaska and Hawaii. The District of Columbia enjoys a special status. Although not "organized" with an independent government, it is not controlled by the executive but by Congress. From the point of view of incorporation it is without question protected by the Constitutional guarantees.

The Territory of Alaska

William H. Seward was a believer in what was at one time called the "manifest destiny" of the United States. He foresaw America as a world power, and in territorial expansion he saw the first step in the progress of this country toward economic and intellectual leadership. It was under Seward, the expansionist, that Alaska was purchased, in 1867, from Russia. At that time it was called "Seward's Folly" and "Seward's Iceberg." It was said that Seward had bought a "polar bear garden." Now, its rich mineral wealth and the proceeds from fishing alone have returned to us many times over the original purchase price. Timber of tremendous value remains and it is entirely probable that other sources of wealth that have not yet been exploited or discovered will be brought to light. The population does not show a great gain. The original thirty thousand, most of whom were Indians and Eskimos, has not quite doubled.

¹ See p 274.

Neglected by Congress, Alaska was left to the care of the army until 1877, after which the navy was the only authority responsible for the maintenance of order until 1884. The only civil officer in Alaska was a collector of customs with less than a half dozen deputies. The only laws extended to the country were certain specific acts such as the federal customs, commerce, and navigation acts, and certain provisions concerning firearms, ammunition, liquors, and fur-bearing animals. In 1884, a civil government was established in which the principal officers were chosen by the President with the advice and consent of the Senate, and the general laws of Oregon so far as applicable were extended to the territory. No provision was made for an Alaskan legislature. In 1906, the election of a delegate to Congress was authorized.

In 1912, the territorial government was reorganized. The Constitution and laws of the United States where not locally inapplicable were extended to Alaska. A system of representative government was established, with a bicameral legislature. The Senate consists of eight members, two from each of the four judicial divisions of Alaska, half the seats being refilled every two years. The House of Representatives has sixteen members, four from each judicial division. Representatives serve for two years, half the term of a Senator. In each case the qualifications are those of a voter, and residence and inhabitancy of the division from which chosen for two years before election. There are many limitations upon the powers of the Alaskan legislature. It cannot change in their application to Alaska the customs, internal revenue, or other general laws of the United States, or those relating to game, fish, fur seals, fur-bearing animals, taxes, schools, care of the insane, or construction of roads. Some other matters, such as the primary disposal of the soil, are removed from the jurisdiction of the legislature. The latter also is subject to limitations in granting franchises, incurring public indebtedness, and making local and special laws. The governor has a veto, which includes the veto of items in appropriation bills. The veto can be overridden by a two-thirds vote of all the members to which each house is entitled. All laws are presented to the United States Congress and if disapproved by it are void. There is provision for the election for a two-year term of a delegate to the federal House of Representatives. He may take part in the debates but may not vote in that body.

Much of the administrative work in Alaska is carried on from Washington through various government bureaus. The Department of Agriculture controls 21,000,000 acres of national forests, and has charge of bird reserves; the Navy Department operates wireless stations; the War Department builds roads and operates a cable to Alaska and telegraph lines within the territory; the Treasury Department issues health regulations, in addition to collecting United States revenues; the Department of Commerce has charge of the great seal herds on the Pribilof Islands, and sells the skins, giving fifteen per cent of the proceeds to Canada and fifteen per cent to Japan under the convention of 1911, leases certain islands for fox farms, protects the fur-bearing animals, regulates fisheries and canneries, and maintains lighthouses. These and many other functions are performed from Washington by federal bureaus. General jurisdiction is vested in the Division of Territories and Island Possessions of the Interior Department.

The Territory of Hawaii

Strategically located in the Pacific Ocean, on a line between Panama and Manila and between Juneau in Alaska and Samoa, lie the Hawaiian Islands, with a fine naval site at Pearl Harbor. There are eight or nine inhabited islands. The most important is Oahu, although it is third in size, for it contains both Pearl Harbor and the capital, Honolulu. The island of Hawaii is the largest in the group. Their climate is one of the best in the world, and this, combined with great natural beauty and romantic associations, attracts American tourists, who in normal times spend ten million dollars annually in the islands. Westward and somewhat northward from the main islands stretch twelve hundred miles of islets, sand banks, and shoals, which constitute the Hawauan Islands Bird Reservation. The total area of these small 1slands is only six square miles but they are rich in bird life. They were made a reservation to protect the birds from hunters who were killing them for their feathers. They end in Kure or Ocean Island, formerly a part of the Territory of Hawaii but now under the jurisdiction of the Navy Department. To the east of Ocean Island are the Midway Islands, likewise administered by the Navy Department. There is a private cable station on the Midway Islands. Two coral islands, Johnston and Palmyra, are not in the Hawaiian chain but are included in the Territory.

As early as 1854, Secretary of State Marcy negotiated a treaty of annexation with Hawaii, but it was not ratified. In 1893, the monarchical government was overthrown in a revolution under the leadership of Americans on the islands, who were aided by United States Marines. A treaty of annexation negotiated by the Harrison administration was withdrawn from the Senate by Cleveland, who had succeeded to the Presidency. In 1894, the new Republic of Hawaii was recognized. A second treaty of annexation, in McKinley's administration, was negotiated, but it did not have the support of two-thirds of the Senate. For this reason, in 1898, after the opening of hostilities with Spain and our victory in Manila Bay, a joint resolution of annexation, requiring only a majority in each house, was passed.

The native population of the Hawaiian Islands had been a healthy race, leading an idyllic existence. European diseases, against which they had acquired no immunity, and admixture with other races have greatly cut down their numbers. The islands now contain many races. In a population of 368,000, nearly a third are aliens, and of the United States citizens, about two-thirds are of Japanese, native, Filipino, Portuguese, Chinese, or Korean extraction. This mixture of races makes it doubtful whether statehood will soon be granted.

The governmental organization is similar to that of Alaska, except that the federal departments do not have so large a field of activity. Relations with the federal executive are through the Division of Territories and Island Possessions of the Department of the Interior. There are a governor and a secretary appointed for four years by the President with the advice and consent of the Senate. They must be citizens of the territory. The governor, with the advice and consent of the local senate, has a large appointing power and a veto, including the veto of items in appropriation bills. The veto may be overridden by a two-thirds vote of all the members to which each house is entitled, with the pro-

viso that in case of a deadlock the appropriation of the preceding year is continued to meet current expenses and legal obligations. The legislature is bicameral, with a Senate of fifteen, chosen from four districts for a four-year term, seven or eight alternately retiring every two years. The House of Representatives is composed of thirty members chosen every two years from six districts. Suffrage qualifications restrict the vote to United States citizens twenty-one years of age who have met certain residence qualifications, are properly registered, and can speak, read, and write either the English or Hawaiian language. The language qualification has the effect of disfranchising many Chinese and Japanese. The legislature meets once every two years, for sixty days, but provision is made for the extension of sessions by the governor for an additional thirty days, and for special sessions.

The islands are provided with a court having the jurisdiction and powers of a United States District Court, with two judges, a district attorney, and a marshal appointed by the President and Senate for a six-year term, unless sooner removed by the President. There is a system of local courts in which the judges of the Supreme and Circuit Courts are chosen by the President of the United States with the advice and consent of the Senate. The United States Constitution and laws where not inapplicable have been extended to the territory. A delegate to the House of Representatives in Washington with a right to debate but not to vote, is elected every two years. Until 1905, there was no general plan of local government, the centralized system of the old monarchy being carried over, but now there is a system of local government based upon counties.

Hawaii exports annually to the United States over a hundred million dollars worth of sugar and pineapples. This trade, and the importance of Pearl Harbor as a naval outpost in any defensive plan for our Far Eastern interests, make it unlikely that the islands will soon be relinquished by the United States.

The Philippines

The Philippine Islands present an interesting example of a subject people that has been trained deliberately for local autonomy

and eventual independence. A conscious plan of this sort is unusual, if not unique, in the history of empires. Gradually the government of the islands has been changed from a military domination to one of complete local autonomy.

The more than seven thousand islands and islets that compose the Philippine group have an area of about 114,000 square miles and sustain a population of around 12,000,000. It is not without some significance that the United States acquired them at a time when the breakup of China seemed imminent and European powers were wringing leases and concessions at various points, north and south, from the apparently impotent government of that ancient empire. The United States did not share in the demand for concessions; but in the Philippines, as a result of the war with Spain, it did secure a foothold in the East. We paid \$20,000,000 to Spain for them.

The people of the islands are Malay, mixed somewhat with Spanish and Chinese. There are many tribes of varying degrees of civilization. The more advanced tribes are Christians. In addition there are the Moros, who are Mohammedans, certain other semicivilized tribes living in mountainous country, and some Negritoes.

Upon occupation of the country by the American army it was placed under military government. This government had its authority from the President as commander in chief of the army and navy. In January, 1898, the First Philippine Commission was sent out to make an investigation and report upon conditions. This commission had no governmental powers, but on March 16, 1900, the Second Philippine Commission of five civilians, headed by William Howard Taft, was appointed and was given the legislative power for the islands and some executive powers. On March 2, 1901, the Spooner Amendment brought the military government to an end, except in areas which were still in a state of insurrection. This amendment marks the end of the period during which the Philippine government was based upon the Presidential authority as commander in chief, for by it Congress asserted its authority to govern these possessions. The executive functions were transferred to Taft as president of the Commission. In 1904, his title was changed to Civil Governor, and in 1905 to Governor General. In 1904, three Filipinos were appointed to the Commission. Another step in the direction of autonomy was made in 1907, when the Philippine Assembly was brought into being. This new body constituted the lower house and the Commission the upper house of the legislature. In 1908, another Filipino was added to the Commission and in 1913 another. The Commission then contained five Filipinos and four Americans, giving the Filipinos control in the upper house.

In 1916, the Jones law reorganized the Philippine government. The territory was given a Senate and House of Representatives, both elective, except that the members for the non-Christian provinces were appointed by the Governor General. The Bureau of Insular Affairs in the War Department exercised general oversight over the islands

The Philippines were represented in Washington by two Resident Commissioners, chosen by the Philippine legislature for three-year terms.

The preamble to the Jones Act declared that its purpose was to prepare the people "to fully assume the responsibilities and enjoy all the privileges of complete independence." Philippine leaders were demanding independence. There was some question in the United States whether the Philippine people were as yet prepared for independence. There was some doubt too as to the actual desires of the mass of the people in respect to independence. These questions were complicated by other considerations. One of these concerned the military value of the islands to the United States. Whether they constituted an advance post in the East, necessary to us in the maintenance of our interests, or were merely an additional problem in our system of defence, an apple to drop into the lap of any naval power that happened to be in a superior position in those waters, was a subject of controversy. Another consideration was the economic one. Americans had large interests there and, moreover, it was felt that the Philippines might be useful as a connecting link with the Eastern continent. On the other hand, some American producers felt the competition with Philippine sugar and vegetable oils and preferred a separation. Pressure from these agricultural groups was influential in bringing about the next step in the progress toward Philippine independence.

In 1934, Congress passed an act which provided definitely for Philippine independence at the end of a transitional period of ten years. During the transitional period the islands will be governed under a constitution drawn up by themselves. The United States is represented in the islands by the United States High Commissioner, appointed by the President with the advice and consent of the Senate. The Philippines are represented in this country by a Resident Commissioner with a seat but not with a vote in the House of Representatives. The term and method of selection of the Resident Commissioner were not determined in the act but were left to the discretion of the new Philippine government. During the transitional period the United States is to levy duties on Philippine sugars, coconut oil, and certain fibers, whenever the amount entering the United States exceeds certain quantities fixed in the act. The duties on these excess amounts will be the same as for foreign countries. At the same time, after the expiration of five years, the Philippine government must levy an export duty on those goods which do not pay a duty in the United States. This export duty beginning in the sixth year must equal five per cent of the rate that the United States applies to foreign countries, and must increase each year until in the ninth year it equals twenty-five per cent of the United States duty. The fund from this export tax is to be used for payment on the Philippine debt. After independence the Philippines will pay the full amounts of duty required by the United States of other foreign countries. There has been much complaint from Philippine sources concerning this matter of duties on the grounds that the island industries have been developed upon the basis of more liberal provisions, and the application of the duties will injure their trade.

Under the provisions of this act the Philippines have drawn up a constitution largely modeled upon that of the United States. It provides for a president chosen for a six-year term by direct vote of the people. An important departure from the United States plan is the provision for a unicameral legislature, the National Assembly, which is not to exceed one hundred and twenty members. The members serve for three-year terms. The President has the power of veto, including the veto of items in appropriation bills.

The veto may be overcome by a two-thirds vote of the entire membership of the National Assembly. The Supreme Court consists of eleven justices. It has power to pass upon the constitutionality of laws and treaties in cases coming before it and may not be deprived of jurisdiction over such cases.

Puerto Rico

The Spanish system of government for Puerto Rico, like that in the other Spanish colonies, concentrated power in the hands of the Governor General, who was the representative of the king. Toward the very end of the Spanish regime on the island a frantic effort was made to retain possession by making some concessions to popular government, but the concessions were feeble and the effort came too late.

A period of military rule by the United States War Department followed the American occupation. This was terminated in 1900 by the Foraker Act, which set up a temporary civil government.

The present government is the creation of the organic act of 1917. Under this act the Puerto Ricans were granted United States citizenship. This has been interpreted as not to constitute evidence that Congress intended to make Puerto Rico an incorporated territory (Balzac v. Porto Rico). There is a governor, appointed by the President with the advice and consent of the Senate. He is assisted by an Executive Council, composed of the seven heads of departments, two of whom are appointed by the President with the advice and consent of the Senate, and the rest by the Governor with the advice and consent of the Puerto Rican Senate. Another important official is the auditor, who is chosen by the President. The Senate of nineteen members, elected for four-year terms, contains five who are chosen at large, the rest being chosen from election districts, each of which sends two Senators. The House of Representatives contains thirty-nine members, serving like the Senators, for four-year terms. Four of the Representatives are chosen at large, and the remainder from single-member districts. The powers of the legislature are restricted in respect to the granting of franchises, as these are controlled by a special Public Service Commission of three members, subject to

the veto of any franchise by the governor or annullment or modification by the United States Congress. To become law a bill must be passed by a majority yea-and-nay vote of the total membership of each house. The Governor's veto, which includes the veto of items in appropriation bills, may be overridden by a twothirds vote of all the members of each house, if the houses are sustained by the President of the United States An interesting provision, which is devised to prevent rush and confusion toward the end of sessions, requires that all bills except general appropriation bills must be introduced during the first forty days of a session. There is a court with the powers of a United States District Court and a system of local courts. The President, with the advice and consent of the Senate, appoints the justices of the island Supreme Court. A Resident Commissioner to the United States is elected for a four-year term. His certificate of election is presented to the Department of State and he is entitled to official recognition as commissioner by the departments of the government of the United States. Under a rule of the House of Representatives he has a seat in that body on the same basis as a delegate having the privilege of taking part in debate but being without a vote.

The island "municipalities" really include rural as well as urban territory. The mayor and assembly are elected for four-year terms.

The Division of Territories and Island Possessions of the Interior Department is charged with oversight of Puerto Rico.

The population of Puerto Rico numbers over a million and a half. The chief export is sugar, which is admitted to this country free of duty, along with other Puerto Rican exports.

Regarding Puerto Ricans as interpreters of the United States to Latin America, we are not attempting to destroy their culture and supplant it with our own. We have encouraged the retention of the Spanish language. Agitation for independence from the United States is not so fervent or well organized as it was in the Philippines, although independence is desired by some. Others content themselves with demands for greater autonomy, while some would be satisfied with the admission of Puerto Rico as a state into the Union. There are some interests in the United

States that would be glad to see the consummation of Puerto Rican independence, for then a tariff would be laid upon the island products that now enjoy unrestricted competition with those of the mainland.

THE UNORGANIZED TERRITORIES AND OTHER AREAS

American Samoa

A group of islands in the southern Pacific, dots on the map of the world and made known to literature by Robert Louis Stevenson, once provided the scene for an international conflict in miniature, with a sudden and dramatic ending.

Three consuls in Samoa, representing Germany, Great Britain, and the United States, were intriguing among the native chieftains, Malietoa Laupepa, Tamasese, and Mataafa, in the late 1880's. Antagonism between the consuls was in nowise diminished when the German warship "Adler" fired upon native villages favorable to Mataafa. Commander Leary of the U.S.S. "Adams" protested against this attack upon women and children. and placed his ship between the "Adler" and the shore with the suggestion that any bombardment would have to go through the "Adams." The American also intervened in matters of less tragic nature. Tamasese's warriors had raided the property of one Scanlon, partly of American parentage, with Scanlon's pigs as the object of their activities. Commander Leary then occupied the property and threatened to shell Tamasese from the latter's nearby stronghold, whereupon Tamasese took to the bush. American government sent naval reinforcements to Samoa.

The climax came one day in the harbor at Apia where warships of the three powers were lying with decks cleared for action. A naval battle might have started an international conflict of serious proportions. In this dramatic moment a tropical hurricane bore down upon the islands. All the ships but one were dashed against the shore. Only the British "Calliope" was able to make its way out to sea in safety.

The tempest in a teapot simmered down, but the comic opera strife of consuls and kings led to an agreement between the three powers which set up a tripartite supervision of the government of the islands. This experiment in joint control was unsuccessful, however, and finally in 1900, by treaty, a division was effected whereby the United States was given as its sphere the rights and claims of the two other powers in all the islands east of the 171st meridian. This included the island of Tutuila, containing the harbor of Pago Pago, the finest in the Southern Pacific. Germany received the islands to the west and Great Britain was compensated elsewhere, but as a result of the World War, the German islands were placed under the mandate of New Zealand. In 1900 and 1904, the Samoan chiefs in our sphere ceded their islands to us. Curiously, this cession was not formally accepted by Congress until 1929, although in the interim the President, through the Navy Department, provided a government for the islands.

The government of American Samoa, as it is now called, is very simple. A naval officer is in control and he governs the territory as he would govern a ship. It is a benevolent despotism and has been highly successful. The natives have been protected from exploitation by prohibition of the sale of communal lands to foreigners. The copra crop is sold for them at auction by the governor. Free medical treatment is given by naval doctors and nurses. In providing a government, the officer in control acts through the native chiefs, who apply the customary law of the people. Samoan district, county, and village governments are retained.

There are three administrative districts, divided into counties, all being based on ancient Samoan divisions. District governors are chosen by the governor of the islands. Each county is administered by the hereditary chief, subject to the control of the district governor. Each village has its chief, chosen annually by the council of heads of families, subject to approval by the district governor. There are annual "fonos" or assemblies of delegates from all American Samoa, and these are preceded by district assemblies for the preparation of business for the general assembly. There are about 12,000 inhabitants, including the 250 American naval officers and men and their families.

To the north of Samoa is Swains Island, formerly ruled over by Eli Jennings, an American, who had established himself there as a kind of South Sea king and had passed the succession down through his descendants. It is now annexed to American Samoa. The chief value of American Samoa to the United States at present lies in the harbor of Pago Pago.

Guam

On June 20, 1898, the U.S.S. "Charleston," under the command of Captain Henry Glass, sailed into the harbor of San Luis D'Apra in Guam, a possession of the king of Spain. Captain Glass was met by a boat carrying officers from the garrison. He informed them of a fact of which they, isolated from the world, were unaware—that the United States and Spain were at war, and that they must consider themselves prisoners. They said that the island could offer no resistance and they were released on parole. In this way we acquired the island of Guam with its excellent harbor, the bay of Apra. It is the largest island of the Marianas group.

Guam is thirty miles in length and from four to eight and a half in width, containing around 225 square miles. It is about 1500 miles from Manila and 5000 from San Francisco.

The island is a naval station under the control of a naval officer who has the title of "Governor." As in Samoa, however, he governs with respect for the customs of the inhabitants. The latter are a mixture of Malay, Spanish, Mexican, and Filipino, and go under the name of Chamorros. They number around 18,000, and live upon the products of the island, importing very little. Their exports are limited to a small amount of copra. In addition to the natives there are less than a thousand American naval officers and men and their families.

For governmental purposes the island is divided into six districts, each with a commissioner at its head. Some of the courts are presided over by natives and some by Americans. Most of the policing is done by about two dozen marines, who also give instruction in sanitation, agriculture, and forestry. There are a few native police, and some forty natives are enlisted in the navy. Sanitation is under the control of a naval officer. Congress has not extended the laws of the United States to Guam and so in this possession the old Spanish law is retained. The whole island has

been made into a naval station so as to comply with laws in regard to federal expenditures.

Its chief value to the United States is in its harbor, the bay of Apra, and in its location as a cable station. Cable messages between San Francisco and the Far East are relayed through Guam. A wireless station also is maintained there

The Virgin Islands of the United States

The Virgin Islands of the United States, formerly the Danish West Indies, were purchased from Denmark in 1917. They cost us \$25,000,000, and the convention transferring them was accompanied by a declaration from the American Secretary of State that we would not object to the extension of Danish political and economic interests to the whole of Greenland. There are three large islands, St. Thomas, St. Croix, and St. John, and forty-eight small islets. The total area is about 133 square miles. The 20,-000 inhabitants are over ninety per cent Negroes and mulattoes with some Danes. They speak the English language. At the present time the population seems to be declining in numbers. Their principal products have been sugar and bay rum ent, under the auspices of the federal government an effort is being made to rehabilitate the islands through the development of the sugar industry and through the establishment of a corporation for the distillation of rum. The chief value of the Virgin Islands to the United States lies in the harbor on St. Thomas. It can be used as a naval base and occupies a strategic position for the defense of our interests in the Caribbean.

United States citizenship was at first conferred only upon such Danish citizens as did not reject it. As the natives were not Danish citizens they were not affected. Later, an act conferred United States citizenship upon the natives. A temporary government was established by an act of Congress in 1917. The old Danish laws, so far as they were not in conflict with the laws of the United States, were retained. There is a governor, appointed by the President with the advice and consent of the Senate, with wide powers that result from his ordinance-making power and his power of appointment. St. Thomas and St. John comprise one

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municipality and St. Croix another. The former has a council of eleven elected members and four appointed by the governor; the latter has a council of thirteen elected and five appointed members. The term of members is four years. The franchise is limited to men of unblemished character, resident in the islands for five years, twenty-five years of age, and with an income of \$300 or property yielding \$60 a year. This practically restricts the suffrage to non-natives. Until February 27, 1931, the islands had for governor a naval officer who reported to the President through the Secretary of the Navy, but by proclamation on that date the President provided for a civil governor who reports through the Secretary of the Interior. General supervision of the islands rests with the Division of Territories and Island Possessions of that department.

The Canal Zone

When the Colombian Senate rejected the Hay-Herran Convention which would have given us the right to build an interoceanic canal across the Isthmus of Panama, a revolution was organized by inhabitants of the Isthmus. Theodore Roosevelt was President of the United States and he wanted a canal at Panama. An early treaty, in 1846, gave us the right to maintain free transit from coast to coast, and American war vessels were dispatched to prevent the landing of Colombian troops in the event of an uprising. Thus we insured success to any rebel government that should accomplish a coup d'état. Our treaty could hardly be interpreted to justify our action, for it was not likely that a country would thus intentionally surrender the right to put down a revolution in its own territory. The revolution occurred late in the day on November 3, 1903; the de facto government of the new republic of Panama was recognized as such on November 6, and within a few days its minister was officially received at Washington. A convention was signed on November 18, 1903, giving us the right to build a canal. Such precipitate recognition of a revolutionary government was certain to arouse suspicion in other Latin-American countries of an aggressive and domineering

policy toward weaker countries that stood in our way. However, it gave us a canal at Panama. The convention was approved by the Senate on February 23, 1904, by a vote of 66 to 14. By it we guaranteed the independence of Panama, agreed to pay it the sum of \$10,000,000, and beginning nine years after exchange of ratifications an annual rental of \$250,000. In return we received a zone ten miles wide for the construction of a canal, and four small islands in the Bay of Panama, with the exception that the cities of Panama and Colon and their harbors were not included in the grant. We were given power to govern this strip and the adjacent waters as if we were sovereign. Strictly, therefore, we are not sovereign in the Canal Zone, but our authority is based upon a perpetual lease which carries full political authority. In addition we received certain rights in relation to the cities of Panama and Colon, and some other privileges connected with the construction and maintenance of a canal. A canal was constructed and has been in use, with some interruptions from landslides in the early period, since the summer of 1914. Colombia persistently protested against our action. In the end we paid that country the sum of \$25,000,000.

The Canal Zone was first governed by a Commission of seven members. Under existing legislation the Canal Zone is governed as an adjunct of the canal under the Governor of the Panama Canal, who is chosen by the President with the advice and consent of the Senate for a four-year term, and who exercises legislative and administrative power both for the canal and the Canal Zone under rules set forth by Congress. There is no local legislature. The governor is always an officer of the corps of engineers of the army, and his authority emanates from Washington. A "district court" and some magistrates courts constitute the judicial system. The governor's activities include the management of the canal, a railroad, hotels, stores for the sale of supplies, and other enterprises which the government has found necessary. Once a place of pestilence, overrun with yellow fever, where to the white man a few years' residence meant certain death, the Canal Zone now is kept healthful and clean under the autocratic control of its governor.

Other Possessions

In addition to the territories discussed above, the United States possesses the islet of Navassa, between Haiti and Jamaica, which originally was occupied in order to exploit its guano deposits, but now is used for a lighthouse. We claim the Great Swan and Little Swan islets, west of Jamaica, accommodating a lighthouse and radio station, although our claim is contested by Honduras. We also claim the groups of Quita Sueño Bank, Serrana Bank, and Roncador Cay, off Nicaragua, occupied under President Wilson by proclamation in 1919, and used for lighthouses. Colombia disputes our claim. In the Pacific, somewhat north of a line between Guam and Hawaii and lying considerably nearer to the former, is Wake Island, which is really three coral islands surrounding a lagoon. It was occupied by the United States in 1898. Its chief value at present is as a temporary base in transpacific air flights. We also possess certain cable and radio station rights on the island of Yap, southwest of Guam, which rights constitute the nearest approach to a territorial gain that came to us from the World War. Three Pacific Islands, Howland, Baker, and Jarvis, are under the jurisdiction of the Division of Territories and Island Possessions of the Interior Department. The United States exercises jurisdiction over Kingman Reef in the Pacific on a line between Samoa and Hawaii. The importance at the present time of even tiny islands which may be used for airplane landings is attested by the fact that we recently have asserted claims to Canton and Enderbury islands lying at the equacor between Samoa and Hawaii. They have been placed in the Division of Territories and Island Possessions of the Interior Department. Christmas Island, also in the Pacific, has been claimed by the United States. Although it is no longer occupied by us, we have not renounced jurisdiction. However, the British also have claims to this island which they have asserted by exploitation. To the above list should be added some more or less intangible claims to the north and south polar regions.

The District of Columbia

The District of Columbia has a distinctive form of government,

as do most of the world's great capitals. It contains the city of Washington, which, at the present time, has no separate political organization. Originally the District included land on both sides of the Potomac River, including the old city of Alexandria, but the Virginia side was ceded back to the state in 1846, and only the area which had been given to the national government by Maryland was retained. As the Constitution gave Congress power of exclusive legislation over such district, not exceeding ten miles square, as might be ceded by the states as a seat of government for the Union, there is no doubt of the power of Congress to determine what the form of government for this area shall be. At one time old Georgetown and Alexandria were separate corporations from the new city of Washington that was growing up around the capitol. The District of Columbia has passed through several forms of government. For a brief period (1871-1874) it had much the same form of government as an organized territory, with a governor, appointed council, and elected lower house. At the present time its government is a system peculiar to itself. By steps it has been transformed into one of the most beautiful and attractive of the world's capitals.

The people of the District of Columbia have no voice either in their local government or in the national government. They elect no council or other officers and have no vote for President, Senate, or House of Representatives. The government of the District is imposed from above. Congress is its municipal council, and fulfills also the duty of a state legislature. Its government, however, is different from that of such "unorganized" territories as Samoa, Guam, the Virgin Islands, and the Canal Zone, in that Congress rather than the executive branch exercises control. From the point of view of the Constitutional guarantees it is more comparable to a state than to a territory, for it not only is protected by the limitations on Congress applying to organized territories but two of its courts were held in O'Donoghue v. United States to be federal courts in which the judges must serve during good behavior. It does not, like the major territories, have a delegate in Congress.

Congress enacts the laws and regulations for the District, except such as are made under ordinance-making powers that have

been delegated by it to local boards and officials. Each house has a committee on the District of Columbia to which are referred bills of a legislative nature dealing with the District, and the Appropriations Committee of each house has a subcommittee on the District of Columbia. Most of the bills referring to the District go to one of these committees in each house.

For most purposes the District is treated, in effect, as a state For instance, the jurisdiction of Congress over commerce among the states and with foreign nations and the Indian tribes includes commerce between the District and a state. In one important respect, however, the District is not considered as a state, for its citizens cannot sue in the federal courts on the ground of diverse citizenship.²

The most important officials of the District of Columbia are the Commissioners There are two civilian Commissioners appointed by the President with the advice and consent of the Senate for a term of three years, and a third, detailed from the engineer corps of the army The engineer commissioner has no definite term, but the army appropriation act for the fiscal year 1915 provides that no officer above the rank of captain shall be paid for detached service beyond four years, and this serves as a practical limitation to four years as commissioner This officer could at any time be sent back to active duty by the President, but usually is retained for four years.

As a board the Commissioners act as an ordinance-making and administrative body. Individually they serve as heads of the various administrative departments, which are divided among them. As an ordinance-making body the Commission acts upon such subjects as have been assigned to it by law, while Congress reserves to itself action upon other matters, or has granted power to independent boards or even to officers subordinate to the Commissioners. The Commissioners appoint the members of some of the various independent boards of the District. Members of the police department and fire department are by statute appointed in accordance with the Civil Service Act and Rules, and, under an executive order, the Commissioners may now make use of the Civil Service Commission in other cases.

² See p 186

The District of Columbia is well administered by the federal government. It is true that the vast properties of the United States are not subject to local taxation. On the other hand the United States now pays an annual sum toward the upkeep of the city. Public scandals such as have disgraced other cities have not appeared in the paternalistic government of the District.

The court system includes the United States Court of Appeals for the District of Columbia, the District Court of the United States for the District of Columbia, Municipal Court, Police Court, Juvenile Court, and United States Commissioners. The first two of these, the United States Court of Appeals for the District of Columbia and the District Court of the United States for the District of Columbia, are held to be "constitutional" courts, set up under Article III of the Constitution. Thus, strictly they are not District of Columbia courts set up under the power to govern the District. Their judges serve during good behavior (O'Donoghue v. United States). The other courts are "legislative" courts and are courts of the District of Columbia.

The United States Court of Appeals for the District of Columbia has no original jurisdiction. In addition to taking appeals from the lower courts of the District it may also take appeals in certain cases from the Post Office Department, the District Board of Medical Supervisors, the Director of Traffic, and the District Commissioners. The federal communications law grants appeals from the Federal Communications Commission upon radio problems. It consists of six justices, appointed for life by the President with the advice and consent of the Senate. Normally, cases are heard by the full court.

The District Court of the United States for the District of Columbia has the jurisdiction of a district court of the United States, and in addition has jurisdiction over cases relating to the District. Like the United States Court of Appeals for the District of Columbia, it has much national business to perform. It reviews certain actions of the Commissioner of Patents. It issues the writ of mandamus or injunction to officers of the United States to compel the performance of ministerial functions or to forbid action by them. It is the only court that has this broad

⁸ See p 203.

power, as other district courts can issue a mandamus only when it is ancillary to a judgment. Many other cases, national in character, come before it because it happens to be in the capital city. The court consists of ten judges, appointed for life by the President with the advice and consent of the Senate, who sit together only for administrative purposes, the cases being heard in its special terms, which are presided over by single justices except in some unusual cases. The special terms are as a United States District Court, a Circuit Court, a Criminal Court, an Equity Court, and a Probate Court. In some of these terms it meets in more than one division. In addition to his judicial duties, the Chief Justice, or in his absence an Associate Justice, issues papers for the rendition of fugitives from justice. The court appoints United States Commissioners and the members of the Board of Education, and performs some other administrative duties.

The Municipal Court consists of five judges, residents of the District, appointed by the President by and with the advice and consent of the Senate, for four-year terms. Cases are heard before individual judges. Appeals on questions of law may be taken to the United States Court of Appeals for the District of Columbia.

The Police Court consists of four judges appointed by the President with the advice and consent of the Senate for sixyear terms. Cases are heard and decided before individual judges. This court has jurisdiction over minor offenses and may hold persons for trial in other courts for the more serious crimes. When acting upon cases of violation of District ordinances and regulations it is spoken of as operating in the District of Columbia branch. When acting upon cases of violation of federal laws, which would normally be tried in a United States District Court, it is spoken of as acting through the United States branch. In the former class of cases the prosecution is in the name of the District of Columbia, and the Corporation Counsel or his assistants act as prosecuting officers; in the latter class the prosecution is in the name of the United States and is conducted by the United States district attorney or his assistants.

The Juvenile Court has jurisdiction of certain offenses by children and some offenses by adults against children. It may turn

over to the Board of Public Welfare destitute, abandoned, and incorrigible children, and has jurisdiction over such offenses as violations of the compulsory school-attendance law and the child labor law. It may parole to the Chief Probation Officer and may impose suspended sentences upon parents guilty of neglect of children. The Court consists of one judge appointed by the President with the advice and consent of the Senate for a six-year term.

The United States Commissioners are appointed by the District Supreme Court and have the same powers as such commissioners elsewhere.

There has been agitation in the District for some form of representation in Congress and suffrage in national elections. In the absence of local suffrage Citizens' Associations have grown up. These voluntary and extralegal bodies are organized for various sections of the District, the white bodies being organized into the Federation of Citizens' Associations. Similar Negro groups are known as Civic Associations. The associations usually charge dues of \$1 a year. The Federation of Citizens' Associations, consisting of two delegates from each Association, meets in the board room of the District Building. The Civic Associations have a Federation of Civic Associations. For a number of years there was also a Citizens' Advisory Council, consisting of representatives from the Federation of Citizens' Associations and the Federation of Civic Associations, to which bills before Congress were referred by the House and Senate Committees on the District of Columbia before action. The Commissioners also consulted it upon the budget and upon legislation. By this means the voteless citizens of the District could express themselves upon legislation concerning themselves. This council no longer is functioning, however.

Protectorates and Spheres of Interest

At Verona, in November of 1822, the four powers of Russia, Prussia, Austria, and France agreed to intervene in support of absolutism in Spain with the apparent intention of bringing the Spanish colonies back into the empire from which they had revolted. This did not accord with the sympathies of the British people. Neither did it accord with British interest, for the return of the Latin-American republics to the Spanish colonial system would end the trade that had sprung up with the new states. Meanwhile, the sympathies of the people of the United States had been enlisted with the new republics, and our policy too was averse to the reconquest of American territory by a reactionary Old World power. Our of this situation arose the Monroe Doctrine.

The original statement of this most famous of American policies is found in two parts of Monroe's message to Congress in December, 1823. The first part was a statement that the American continents were no longer open to colonization by European powers. It had specific reference to certain claims then being advanced by Russia to territory on the north Pacific coast. The second part referred to the Verona agreement, and after disclaiming interest in the wars of European powers in matters relating to themselves, stated that in movements in this hemisphere we were more immediately connected. It then referred to the difference between the governments of the allied powers and our own, and declared: "We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States."

There has been one important extension of the Monroe Doctrine since that time. In 1825, we took the position that we would not consent to the occupation of Cuba and Puerto Rico by any European power other than Spain. In other words, we will

not permit the transfer of American colonies from one power to another, or at least from a weak nation to a strong one. The Monroe Doctrine is justifiable as a defensive policy on the part of the United States, to preserve our own institutions, to prevent European rivalries and wars over American territories, and to prevent the extension of the "balance of power" to America. This does not detract from the idealism of Henry Clay and Americans generally whose sympathies were enlisted in the struggle for liberty among the dependencies of Spain and in the cause of representative government.

We have never been under the necessity of resorting to arms in defense of the Monroe Doctrine, although that extremity has seemed dangerously near at times. When the French occupied Mexico under cover of Maximilian's "Empire," when the British threatened in Venezuela in 1895, and again when the Germans apparently were threatening in the same country in 1902, we might well have been compelled to fight for it had it not been that any European nation that challenged it might have precipitated a European war. The Monroe Doctrine has never been defined by Congress nor adopted, except indirectly, by that body. It has been an "executive policy" supported by the public opinion of the country. In an indirect way the Senate did give its approval to the principle of the Monroe Doctrine when, in 1912, there was danger that a Japanese company would receive a concession in Mexico at Magdalena Bay. At that time the Senate adopted a resolution presented by Senator Lodge, stating that we could not see without grave concern the occupation of a military or naval point on the American continent by any corporation or association which had such relations with another government, not American, as to give that government a control for military or naval purposes.

A sort of corollary to the Monroe Doctrine is our Caribbean policy. This has never been formulated in words, but has had ample demonstration in our actions. Our interest in Cuba was demonstrated very early and our close relationship to Central America was well appreciated. The building of the Panama Canal has renewed and increased our interest in the countries that lie between us and that waterway.

With the defeat of Spain in 1898, we might well have insisted upon retaining so desirable an island as Cuba, "The Pearl of the Antilles," despite previous official protestations disclaiming such designs. However, we preferred to grant independence under a protectorate. Under the terms of the Platt Amendment (to the army appropriation bill of March 2, 1901) we insisted upon eight concessions to be inserted by Cuba in its constitution. The conditions laid down in the Platt Amendment were: (1) that Cuba would not by treaty or in other manner permit its independence to be impaired by another power; (2) that no debt should be contracted that could not be paid from ordinary revenues; (3) that the United States should have the right to intervene in Cuba to preserve its independence and maintain order; (4) that Cuba ratify the acts of the United States during the occupation: (5) that Cuba continue the improvements in sanitation inaugurated by the United States; (6) that the disposition of the Isle of Pines be determined later; (7) that the United States be granted lands necessary for coaling or naval stations; (8) that these provisions be embodied in a treaty.

These provisions were embodied in a treaty signed in 1903. In 1934, however, a new treaty abrogated all the stipulations except those affecting coaling and naval stations. Thus, except in respect to these provisions, the Platt Amendment is not now in effect.

Under our right to acquire a naval station we have chosen Guantánamo, where we have a lease at a rental of \$2,000 a year. In 1906, it became necessary for the United States to occupy Cuba and take over its administration. The occupation was ended in a little over two years. As a result of our close relations with Cuba we have a reciprocity in customs under which each country grants to the other lower tariff rates than are applied upon the goods from other countries.

In 1905, President Roosevelt negotiated a protocol with the Dominican Republic under which we were to administer its customs and supervise the settlement of its debts. The protocol failed of ratification in the Senate but Roosevelt proceeded under a modus vivendi without a treaty. In 1907, the Senate accepted a treaty, somewhat modified in form from the protocol of 1905.

It was necessary to undertake this supervision of finances in order to prevent a possible occupation of the Dominican Republic by foreign powers in the interest of their nationals who were clamoring for the repayment of loans. This might have developed into a permanent occupation and a challenge to the Monroe Doctrine. The finances of the country were in such a state that it was not likely that they would be straightened out unassisted. Our action was characterized as the "big stick" policy of Theodore Roosevelt, that is, that we would force neighboring small countries to live up to their international obligations. In his message of December 6, 1904, Roosevelt had said: "Any country whose people conduct themselves well can count upon our hearty friendship. . . . Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere, the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power."

Under President Wilson we undertook a military occupation of the Dominican Republic, but this was terminated by succeeding administrations.

Again, under President Wilson, turbulent conditions in Haiti led to an occupation in 1915. This occupation, also, has been ended.

For a period we kept a force of marines in Nicaragua. Disturbed conditions in that country led us in 1912 to station there a guard of marines, and they were retained up to the beginning of 1933. We intervened in revolutionary disturbances, supervised elections when it was deemed necessary, and used our good offices to maintain the course of constitutional government. With Nicaragua we also have a treaty, concluded in 1916, granting us in perpetuity the exclusive right to construct a canal, together with a ninety-nine year lease (renewable for another ninety-nine years) of a naval base in the Gulf of Fonseca and of the Great Corn and Little Corn Islands as coaling stations. This treaty cost us \$3,000,000. Costa Rica, El Salvador, and Honduras hold that this

treaty violates certain rights belonging to them. The Central American Court of Justice, established by the five states of Central America under the auspices of the United States, upheld the claims of Costa Rica and El Salvador in cases brought by those countries, but as the United States was not a member of the court it refused to declare the treaty void. Both Nicaragua and the United States have ignored the decision.

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PART III THE STATES



CHAPTER XIV

New States

The States as Part of the Governmental Structure

In the structure of government in the United States, the states are as important, or even more important, than the federal government. In following the plan of studying the governmental organization before undertaking the question of the forces that operate back of this formal structure, the next subject for study, therefore, is the position of the states in the Union and their governmental organization.

The Western Lands

When the Articles of Confederation were presented to the states for acceptance there was fear that in the new Union the smaller states would be overshadowed by those that held claims to vast tracts west of the Alleghenies. Maryland refused to accept the Articles until it became clear that such claims would be surrendered. In time all the Western lands were ceded to the United States.

The Congress of the Confederation showed wisdom in its attitude toward the new acquisitions. In the instrument that laid the foundations for their political future it performed its greatest, possibly its only, act of real statesmanship. The prevailing practice of the times sanctioned the retention of such possessions as subject provinces, governed by the central authorities and administered with the welfare of the older states in mind. If Congress had followed a shortsighted policy of this sort it would have been disastrous, for as the Western provinces became more populous and wealthy they would have revolted against any conditions less than those of equality with the older states.

Secessions would have been certain. Fortunately, another policy was followed.

The resolution of Congress which called upon the states for a cession of their claims was followed by a proposal that new states should be formed which should become members of the federal Union When Virginia surrendered its Northwest claims it repeated this proposal.

An early plan was set forth by certain officers of the Continental Army, conspicuous among whom was Timothy Pickering. This plan had for its primary purpose the distribution of land to the members of the army, and, if it had been adopted, it would probably have led to the establishment of a state in the Western country from which slavery would have been excluded.

In March, 1784, Congress was presented with a proposed ordinance, drawn up by Thomas Jefferson, which provided for a division of the Northwest into ten political units, each of which should be granted a permanent constitution when the number of free inhabitants reached twenty thousand, and should become a state when the number of free inhabitants reached that of the least numerous of the thirteen original states. He gave these states rather high-sounding academic names—Metropotamia, Michigania, Assenisipia, Polypotamia, Illinoia, Pelisipia, Sylvania, Washington, Saratoga, and Cherronesus. Slavery and involuntary servitude, except in punishment of crime, were to be excluded after 1800. The clause in regard to slavery and the high-sounding names were dropped by Congress and some changes were made in the boundaries of the states. Thus altered, Jefferson's plan was adopted, but it did not go into effect.

It was not until July 13, 1787, that Congress passed its famous Ordinance for the government of the territory northwest of the Ohio. At first this region was to constitute a single district, with a governor, a secretary, and three judges, chosen by Congress. When there should be five thousand free adult male inhabitants there was to be a government consisting of an appointed governor, an elected house of representatives, and a legislative council of five persons chosen by Congress from a list of ten persons nominated by the house of representatives. The territory might be divided into districts and when the free population of any one

of these should reach 60,000, it was to be admitted into the Union as a state. Slavery and involuntary servitude, except in punishment of crime, were prohibited. The principle that complete federal control should be followed by a largely autonomous territorial government, which again should be followed by statehood as the population increased, was applied subsequently to most of the continental territory of the United States. Nearly all of the states added to the Union have first passed through a "territorial" stage. There are some exceptions. Texas, which had been organized as an independent country, was made a state without having passed through the quasi-autonomous "territorial" stage. California, after its acquisition from Mexico, was admitted to the Union as a state. Vermont, Kentucky, Tennessee, Maine, and West Virginia were carved from existing states.

Admission Procedure

New states are added to the Union under special Constitutional grant. "New States may be admitted by the Congress into this Union. . . ." (Article IV, Section 3). It is probable that the power exists even without this grant.

The Constitution provides no definite procedure for admission and no rules to govern Congress in determining when to admit a new state, and no uniformity has been established by practice. The most common procedure has been for Congress to pass an "enabling act," permitting the people of a territory to elect a constitutional convention to draw up a constitution, which is submitted to the people for a vote. If the vote 1s favorable and any other conditions that Congress may have laid down are met, the President may be authorized to proclaim the facts and the state is admitted without further action by Congress. On the other hand, Congress may require that the constitution be brought to it for approval before admission is effected. In at least two instances (Arızona and New Mexico) Congress has then stipulated that certain conditions be met, after which a Presidential proclamation was sufficient to admit. In the case of Nebraska the original act permitting admission upon proclamation was followed by another act laying down further conditions to be met before

such admission. There are altogether thirteen instances of Presidential proclamations admitting new states to the Union. They are, in addition to the three above mentioned: Missouri, West Virginia, Nevada, Colorado, South Dakota, North Dakota, Montana, Washington, Utah, and Oklahoma. In the others the action of Congress was final.

The Equality of the States

There is some question as to the extent to which requirements, binding in the future, can be laid upon incoming states. In the case of Arizona, as a condition precedent to admission, it was required that there be eliminated by popular vote a clause in the constitution providing a procedure for the popular "recall" of judges. After admission the state replaced the provision. This, however, was not in violation of any pledge to the United States, for no such pledge had been made, unless it could be argued that a pledge was implied in the conditions and procedure of admission.

A better example is the case of Oklahoma. The enabling act for that state provided that the capital should not be changed from Guthrie previous to 1913. The state constitutional convention "by ordinance irrevocable" was to accept those terms, and such ordinance was adopted by the convention and ratified along with the constitution. However, in 1910, the state legislature provided for the removal of the capital to Oklahoma City. In Coyle v. Smith, in 1911, it was held that Congress could not admit a state upon any terms other than those of equality with its sister states, and that the action of the legislature was entirely within its power.

It is important to note that the attempted restriction upon Oklahoma was not one that directly affected property rights. The determination of the location of a state capital is a purely political matter. To restrict the power of a new state upon political matters would put it in a position inferior to other states. On the other hand, where a state has entered upon an agreement at the time of admission dealing with property rights, it has made a compact such as any other state could make and it appears that such agreements must be observed (Stearns v. Minnesota).

There is no rule to determine when a territory may become a state. Congress has often been guided by political considerations. Nevada was admitted largely because of the need for administration votes in the Senate at a critical period in our history (October 31, 1864). Maine and Missouri were admitted nearly simultaneously in order to preserve the balance between slave and free states.

Geographical Integrity

After a state has been admitted to the Union it cannot be divided by subsequent acts, or joined to any other state, without its own consent: "... no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress" (Article IV, Section 3).

Under the stress of the Civil War these restrictions proved ineffective to prevent West Virginia from being carved from the state of Virginia. Obviously the state of Virginia would not consent to the separation of its western parts and the creation of a new state therefrom. The deed was accomplished when Congress accepted a consent given by another body that called itself, and was recognized by the United States government as, the legislature of Virginia. The consent of the "legislature" of Virginia having been given, the new state was created.

Secession

The question whether it is permissible for a state to secede from the Union is bound up with an important epoch in American history. It centered around certain legal questions and certain questions of political theory. The fathers probably had some indistinct idea that they were creating a new sovereignty while the states retained their sovereignty. Later, John C. Calhoun pointed out the inconsistency in this idea of a divided sovereignty and even his opponents accepted the truth of his doctrine that sovereignty is a unity.

The term "sovereignty" carries the idea of the supreme author-

ity in the state, and supremacy cannot rest in two places at the same time. There cannot be two authorities both of which are supreme. After demonstrating that sovereignty must rest in either the state or the nation as a whole, Calhoun placed it in the former. The supporters of a legally indestructible Union accepted his doctrine of the unity of sovereignty but placed it in the United States as a whole. The Webster-Hayne debates brought out the divergence of the two schools of thought upon the Constitutional argument. Hayne argued that the Constitution was a compact between the states. Webster replied that it was an instrument made by the people of the United States collectively. The Civil War brought the problem to a practical test. While a war cannot decide a legal question, it can bring an end to a controversy, and it required the Civil War to accomplish this for the question of secession.

It would appear that if secession is impossible, no action of the federal government, even in conjunction with a state, could bring about the separation of a state from the Union. Nothing short of a Constitutional amendment, or possibly a treaty, could accomplish that end. However, upon the conclusion of the Civil War this doctrine was challenged by some of the very persons who might have been expected to uphold it. If the Northern states were justified, constitutionally, in resorting to force in order to prevent the secession movement, it was upon the doctrine that no state could legally withdraw from the Union. Curiously, there were radicals in Congress who held that the member states of the Confederacy were not now entitled to the privileges of states of the Union. This underlay the so-called "state suicide" theory of Sumner and the even more extreme "conquered provinces" theory of Thaddeus Stevens. The majority in Congress took the more moderate position that the Southern states had been, throughout the war, and were now, members of the Union. The only Constitutional bases for the military governments that were established in these states and for the rejection of their representatives in Congress were the Constitutional guarantee to the states of a republican form of government and the power of each house to pass upon the elections, returns, and qualifications of its members. It should be noted that these powers have reference to the government of the states and not to their legal status as states.

The Alzenation of Territory

Another interesting phase of this matter relates to the alienation of territory. Would it be Constitutional for the United States to cede to a foreign country any of the territory of a state without its consent? This problem arose in the Maine boundary controversy. The states of Maine and Massachusetts advanced claims to certain territory which was also claimed by Great Britain. The United States and Great Britain settled the matter by drawing a compromise line. Since the United States had contended for the whole territory in dispute, this compromise might be regarded as a surrender of the territory of a state. The difficulty was surmounted by making a payment to Maine and Massachusetts in settlement of their losses. Of course, from the international point of view the treaty between Great Britain and the United States was sufficient to settle the matter. Other countries cannot be expected to go into fine points of our Constitutional law. They must assume that the treaty-making power has authority to make any such agreements as it enters into. In fact, it may well be argued that even from our own Constitutional point of view the treaty-making power can negotiate any such treaty even without the consent of the states concerned.

Boundary Disputes

Disputes over the boundaries between states are within the jurisdiction of the Supreme Court. This was held in the early case of Rhode Island v. Massachusetts.

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CHAPTER XV

Relations Between the States

Reasons for the Adoption of the Federal System

Federalism in America is the result of practical considerations. Many theoretical arguments are advanced in its favor, but the real reason for the adoption of the federal system was the necessity for reconciling the local feelings and jealousies of thirteen independent communities that could not have been induced to surrender to a distant authority even the potential control of their local destinies.

In a federal system a sphere of action is granted to the central government, and beyond this sphere it cannot go. Opposed to the federal system is the unitary system, such as that of France, under which the central legislature determines the sphere of action of the local governments. The latter are the instrumentalities of the central government even though they may be permitted by it to exercise a large degree of discretion. Thus the sphere of action of the local governments is left to be determined by the good sense of the central legislature. The danger in the unitary plan lies in the possibility that this central body, in a craving for the exercise of power or a passion for uniformity, will invade the domain that should be left to local authorities.

The Breakdown of State Lines

At the same time, certain defects are inherent in the federal system. The forty-eight states of the United States no longer represent distinct communities, each carrying on its own activities with little reference to its neighbors. Economic and social forces have broken down state lines. Commerce and communication have not been interrupted by political boundaries. The individual states are distinct politically but they are not distinct socially

or economically. In fact, greater differences may exist between localities within a single state or between the country and the city areas in the same state than exist between that state as a whole and neighboring states.

Social and economic differences do appear to some extent between sections of the country and it has been suggested that it would be well to do away with our present state system and develop a new federal system in which there would be only a very few states, each covering a section of the country, as, for instance, New England or the old South, representing a more or less distinct social and economic complex. Such suggestions, however, are not likely to be carried out. The tendency is to retain the present state system modified, where necessary, by extensions of power on the part of the national government.

Reciprocal Legislation

There are some matters, however, over which the states have jurisdiction and which cannot be dealt with by the national government, but which should be handled in a uniform way over the whole country. Congress could be given jurisdiction of these matters by Constitutional amendment. This, however, would involve a centralizing process which is feared by many persons. An alternative that has been suggested for the solution of some of these problems is reciprocal legislation among the states, that is, the passage of the same law upon a subject by each of the states so that a uniform rule would be in force over the entire country.

An important agency working toward this end is the National Conference of Commissioners on Uniform State Laws, an outgrowth of the American Bar Association. The object of the Conference as set forth in its constitution is "to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." The Conference consists of delegates who are named by the governors of the states and territories, in most instances by special legislative authority. The delegates are members of the legal profession and they serve without compensation. The Conference has met annually since 1892. Drafts of proposed uniform acts are discussed in detail. After

approval by the Conference, an act is recommended for adoption in the various states. In some instances the Conference has had remarkable success in securing adoptions. The Negotiable Instruments Act, approved in 1896, has been adopted in more than fifty jurisdictions; the Warehouse Receipts Act of 1906, in nearly fifty jurisdictions; the Sales Act of 1906, in more than thirty jurisdictions; the Bills of Lading Act of 1909, in nearly thirty jurisdictions; the Desertion and Non-Support Act of 1910, in nearly twenty jurisdictions. Some states have been progressive in falling into line on these acts. Idaho, Louisiana, Maryland, Michigan, Nevada, New York, Pennsylvania, South Dakota, Tennessee, Utah, and Wisconsin have each adopted more than twenty of the proposed laws. In every jurisdiction some of the proposed acts have been adopted.

It is much more difficult to secure united action upon social questions than it is upon commercial matters like most of those listed above. In the latter there is need for agreement only upon details, for there is no controversy over fundamental problems. Where social questions are involved, however, there is much disagreement upon underlying philosophy. In the matter of divorce the attitude of South Carolina, which allows no divorce under any circumstances, and that of Nevada, which provides an easy process, are based upon premises so different as hardly to admit of a common ground of understanding. Upon questions affecting child labor, likewise, it is difficult to secure uniformity.

However, even upon some of the social and economic questions it may not always be necessary to secure the unanimous agreement of all the states in order to bring about effective regulation. The location of most industries is dependent upon such matters as proximity to raw materials and the existence of transportation facilities. Thus, an industry is likely to be limited to a few states. The cotton textile industry, for instance, is limited to less than a dozen states. Effective regulation might be secured through the passage of identical laws by these states. Nevertheless, though their number is small, such states are in competition, and this competition tends to prevent remedial social legislation.

An interchange of ideas is afforded by periodic conferences of state governors. If the governors were permanent, trained, pro-

fessional officers, such conferences might accomplish much in the improvement of administrative procedures and in the coordination of state agencies. Since the heads of our states necessarily are political officers and are constantly changing, their conferences are less productive of constructive measures. Conferences of governors are a hopeful sign, however, and they have accomplished much in the way of bringing before the public a realization of the confusion that exists in such matters as our conflicting tax laws.

Interstate Compacts

In view of the difficulty in securing uniform legislation through independent action by each state, it has been suggested that the provisions of the Constitution concerning compacts might be invoked:—"No State shall enter into any Treaty, Alliance, or Confederation. . . ." "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ." (Article I, Section 10).

It will be observed that a "Treaty, Alliance, or Confederation" is absolutely forbidden, while an "Agreement or Compact" may be entered into with the consent of Congress. The distinction between these terms has not been passed upon directly by the courts, although it has been suggested that a "Treaty, Alliance, or Confederation" is a contract which would affect the political power of the state, whereas an "Agreement or Compact" is one that would not affect the political power of the state. No state compact has yet been held to belong to the forbidden class.

It would appear from the text of the Constitution that no interstate compact without Congressional consent is permissible. A number have been made without such consent, however, and have been upheld in state courts. The same position was taken by the United States Supreme Court in a case involving a contract establishing a boundary line (Virginia v. Tennessee), and a case in which Arkansas, with the consent of Missouri, incorporated a company already incorporated by the latter state (St. Louis and San Francisco R. Co. v. James). The reasoning in some of these cases seems to imply that an agreement that does not affect the political power of the states concerned or of the

United States does not require Congressional consent, although a more logical theory is suggested by the court in Virginia v. Tennessee, to the effect that the consent of Congress may be implied in certain cases where it is not given in express terms.

Where interstate compacts involve property rights they are not subject to violation by subsequent legislatures, as this would be an impairment of the obligation of a contract in conflict with the federal Constitution (Green v. Biddle). It would seem, however, that other contracts than those affecting property would be subject to change under the general principle that no legislature can bind its successors.

There are many administrative matters, now often controlled by boards applying different rules in each state, that could be controlled under authority of state compacts, through cooperating boards or even by a joint commission for several states. Factory regulation might be made uniform in this way for a whole industry scattered through several states.

Interstate Rendition

Some interstate problems arise in connection with the administration of justice. No state can exercise extraterritorial jurisdiction. As a result, a criminal taking refuge in a state other than the one in which the crime was committed can be brought to trial only by taking him back to the state in which the crime was committed. To overcome this difficulty the Constitution provides that:

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime" (Article IV, Section 2).

While the clause reads that the fugitive "shall" be delivered up, there is no way to bring compulsion on a governor who refuses to surrender the fugitive. The Supreme Court has refused to issue a mandamus upon the governor in such a case. In 1859, a grand jury in Woodford County, Kentucky, brought in an indictment against one Willis Lago, for aiding in the escape of

Charlotte, a slave. The governor of Kentucky presented a demand to Dennison, the Governor of Ohio, into which state Lago had fled, for the surrender of the fugitive. Dennison refused to surrender Lago. A request was presented to the Supreme Court of the United States for a mandamus to compel the governor to surrender the fugitive. The Supreme Court held that it was a moral obligation upon the governor to surrender the fugitive but that the federal courts could not enforce the obligation. The motion for a mandamus was overruled (Kentucky v. Dennison). If, therefore, a governor believes a man to be innocent, or for any other cause does not want to surrender him to the officers of another state, the federal government can do nothing to compel him to take action.

On the other hand, if a governor has ordered the arrest of an alleged fugitive from the justice of another state, the courts, either federal or state, may review his action in habeas corpus proceedings to determine whether the arrest has been made without proper evidence, first, that the individual has been duly charged with the crime, and second, that he is a fugitive from justice. If this evidence is not produced the arrested person may be released (Roberts v. Reilly).

In one instance, a person charged with crime in Kentucky, who at the time was in West Virginia, was kidnapped and returned to Kentucky, where he was placed in jail. The federal courts refused a request of the governor of West Virginia for the release of the prisoner, holding that they had no jurisdiction, at least in the absence of Congressional legislation. The question of the effect upon the case of the illegal seizure of the prisoner was a matter for the determination of the courts of Kentucky (Mahon v. Justice). The persons who took part in the abduction, of course, had broken the peace of the state of West Virginia and could be punished by that state if they came within its jurisdiction

In another case, it has been held that if the governor surrenders a fugitive upon extradition papers alleging a certain crime, it is permissible for the state into which he is returned to try him for other crimes than the one for which surrendered (Lascelles v. Georgia).

This process of bringing back a fugitive for trial is usually referred to as extradition, through analogy with extradition between independent countries. A better practice is to refer to the surrender of fugitives between the states of the United States as interstate rendition, for the principles underlying it are different from those in international extradition. In the latter practice, the United States will surrender only under treaty provision and for specified crimes, although there is an instance in which the executive did, in 1864, surrender a fugitive to the Spanish government in the absence of a treaty. "Political" crimes are not customarily included in extradition treaties. It has been held that a person extradited from a foreign country for one offense may not be tried for another offense until he has had opportunity to return to the country that surrendered him (United States v. Rauscher). However, this rule would not apply where the extradition treaty provides otherwise.

In interstate rendition, the papers are prepared by the governor of the state in which the alleged crime has been committed. This is in accordance with the Constitutional provision. The federal statutes provide that the demand must be delivered to the executive authority of the state into which the person has fled, accompanied by an indictment or affidavit charging the crime. The fugitive is then to be turned over to the agent of the state making the demand. Expenses are to be borne by the latter state.

It will be observed that difficulties are likely to arise through the inability of officials of the state in which a crime has been committed to arrest the criminal in another state, while the state in which the criminal has taken refuge cannot arrest him without rendition papers. Difficulties may also arise when a crime has been committed at some undetermined point near the border of two states, or when the crime has been committed in a state other than the one in which the criminal was living at the time of the crime, as, for instance, when the criminal has been guilty of false advertising in one state while he is living in another.

A criminal cannot be arrested for the purpose of interstate rendition unless he is a fugitive from justice. For instance, a father who has been sending money to his family in another state suddenly discontinues this support. Although he has been guilty of abandonment in the state in which his family resides, he was not present in that state and therefore cannot have left it since the commission of the crime. Therefore, he is not a fugitive from justice and cannot be extradited. Probably such abuses could be corrected by interstate compacts for the surrender of persons accused of crimes but who are not fugitives.

Full Farth and Credit

The Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof" (Article IV, Section 1).

The effects of this clause usually appear in the courts of one state when there is brought into question the validity of some record or judgment of another state. Such record or judgment is given by the clause the same validity that it would have if it were a record or judgment of the state in which it was being brought into question. For instance, a birth record in another state will be accepted as having the same validity that it would have in the state in which it was recorded. A marriage in another state will be recognized on the same basis as a marriage in that state. The judgment of a court in a civil suit in another state is enforceable just as though it had been rendered in the state in which it is now being brought into play.

There are two important limitations upon the effects of this clause. In the first place, in respect to judgments in the courts it applies only to civil judgments. The clause does not compel one state to enforce the criminal laws of another state. Therefore, a verdict in a criminal case could not be enforced in other states.

In the second place, the courts of one state do not recognize a judgment rendered by a court in another state unless the latter court had jurisdiction of the case in which the judgment was rendered. This question of jurisdiction arises particularly when divorces have been granted in one state and are being questioned

in another. The lax provisions of certain states in reference to divorce have contributed largely to embarrassment in this respect. For instance, let us assume that a man and wife had a matrimonial domicile in one state and the husband went to another state, lived there a short time, and received a decree of divorce, while the wife remained at home. This decree might be questioned on the grounds, first, that the husband had not acquired a bona fide domicile in the state that granted the divorce, and second, that the wife, being outside the state, could not have been served with notice of the suit. If the divorce had been secured in the state of matrimonial domicile, that is, the state in which husband and wife had their permanent residence, and notice by publication had been served on the party absent from the state at the time of the divorce, the situation would have been different.

In any instance the problem is one of the jurisdiction of the court. If the court had jurisdiction, its decree would be valid. If it did not have jurisdiction, its decree might be questioned in other states.

Thus, there is much confusion in the divorce situation in this country. Persons who thought themselves divorced and have remarried might discover that their divorce decrees are not valid in states that do not recognize the jurisdiction of the state that granted the decree. On the other hand, it will be noted that such questions usually arise when one of the parties has left the matrimonial domicile in order to secure an easy divorce in another state. The effect of the present rule is to protect those states that prefer to maintain the more severe requirements for divorce.

The Comity Clause

The so-called "comity clause" of the Constitution provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" (Article IV, Section 2).

This clause does not grant to the citizens of any state the right to carry the privileges and immunities of that state into another. It merely grants to the citizens of one state the right to enter another state and partake in the privileges and immunities there on a parity with the citizens of that state. As a matter of fact, even

this right is subject to some limitation. For instance, the right to vote may be made subject to a reasonable period of residence. It has also been held that a state may restrict the rights of citizens of other states in the killing of wild game within the state. Wild game is considered the common property of the citizens of the state in which such game exists and the state is not under the necessity of granting complete parity to noncitizens. Oysters are wild game within the meaning of this rule (McCready v. Virginia). In general, however, noncitizens within the state enjoy equality under the comity clause and have the right to live in the state, to acquire property and carry on business, to claim the protection of the state and the justice of its courts, paying taxes no greater than those of citizens, and exercising the suffrage under such reasonable regulations as may be necessary. As a matter of fact, probably most of these privileges and immunities are also protected under the provisions of the Fourteenth Amendment in respect to due process of law and the equal protection of the laws.

The comity clause is applicable only to citizens. A corporation, although a person in the eyes of the law for certain purposes, is not a citizen of the state which incorporates it, within the meaning of the comity clause. As a person, however, a corporation enjoys due process of law under the guarantee in the Fourteenth Amendment and thus secures most of the advantages given to citizens under the comity clause.

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CHAPTER XVI

The State Legislature

POWERS

Theory of Powers

The theory of our system of government begins with the state as the basic element. The state possesses all governmental powers that are not taken away from it by the federal Constitution.

Within the state the legislature is presumed to possess all powers except such as are taken away from it by the state constitution, although there are some early decisions which indicate that the legislature is limited by principles of natural justice. Thus the state legislature is the residuary source of governmental authority in the United States. Its powers are not looked upon as having been conferred upon it by the state constitution, which may place limits upon the legislature but does not grant powers to it.

Back of the legislatures are the voters, who constitute the source of power in a political sense. It is the electorate that chooses the members of the legislature and the other officers of government, and that thus ultimately controls policies. Broader than the electorate are the people, whether voters or not, who formulate the public opinion that guides both voters and legislatures. In the legal sense, however, it is the state legislature that is the ultimate source of powers, since it may enact any laws that are not prohibited to it by the state constitution or denied to the state by the provisions of the federal Constitution.

The state legislature thus occupies a different position from Congress, which possesses only such powers as are granted to it directly or indirectly by the federal Constitution.

¹ See p. 533

Actual Powers

The actual legislative powers of the state legislature are not only broader in scope than those of Congress but they deal with matters that more intimately affect the individual. Congress is concerned primarily with such matters as interstate commerce, the postal system, and external relations. Even with the broad interpretation that has been given to the commerce power, the ordinary individual has, at least until very recently, had little or no direct contact with the federal government. Congress owes much of its prominence to the size of its appropriation bills, its war powers, and its incidental control of the army and navy. Indirectly, through the influence of its money grants for various purposes, through its agencies for research and fact-finding, through its foreign tariffs and internal taxes, and through its regulation of interstate commerce, it exercises a great influence upon local commerce and industry. In time of war and national emergency Congress has expanded its activities in these respects. It is true, too, that there has been a tendency gradually to extend federal activities and this has shown increased acceleration in recent years. However, the state is still the primary factor in the control of local business.

The prevention, detection, and punishment of crime are state matters. Education, health, and sanitation are in the most part state problems. The professions are subject to state control. The state possesses the "police power" for the protection of the public health, safety, morals, and general well-being.² All these powers are exercised by the state legislature directly or are delegated by it to the counties, cities, and other units of local government. It is with the acts of the state legislature or its local organs, and not those of Congress, that the individual has by far the most contact.

The state legislature also has functions that are not legislative in nature. It exercises "constituent" powers, in that it takes part in the amending of the state constitution and also may be used as a part of the machinery for amending the federal Constitution. As the rule-making body in the state administrative system it

² See p 545

passes laws that create and control the state administrative officers and boards. The power to tax and spend money may be considered in large part incidental to its other powers, but these may become means of control independent of its direct powers. Its cooperation with the federal government may be necessary for the enforcement of national laws. The Volstead prohibition act was an example of a federal law that suffered frequently through failure of the states to cooperate fully in its enforcement. In impeachments, the state legislature functions toward the state administration as does Congress toward the federal administration. Each house passes upon the elections and qualifications of members, as do the houses of Congress. Each house also, through its committees, may conduct investigations of the state administration. Such investigations may disclose administrative abuses or may serve as a basis for recommendations for improvement in the organization of departments and bureaus.

Federal Restrictions

Obviously the state legislature cannot act upon subjects removed from its jurisdiction by the federal Constitution. The tenth section of the first article of the Constitution lays down a number of direct prohibitions. A state is prohibited from entering into any treaty, alliance or confederation, granting letters of marque and reprisal, coining money, emitting bills of credit, making anything but gold and silver coin a tender in payment of debts, passing bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, or granting of titles of nobility. Certain other things are permitted only with the consent of Congress. A state may not, without such consent, lay imposts or duties on imports or exports except to cover the expenses of inspection laws, and even when such consent is given the state law is subject to revision by Congress, and the net produce must go into the treasury of the United States. A state may not, without the consent of Congress, lay tonnage duties, keep troops or ships of war in time of peace, enter into an agreement or compact with another state or a foreign power, or engage in war unless invaded or in such imminent danger as will not admit of delay. Some of

these prohibitions of Article 1, Section 10 are discussed elsewhere. Some, such as the prohibition upon letters of marque and reprisal, have little significance at the present time. The fourth article also places restrictions upon state action, in providing that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; in providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states; and in providing for the return of fugitives from justice and of escaped slaves.4 In prohibiting slavery and involuntary servitude the Thirteenth Amendment applies to the states as well as to the federal government. The first article, the Fifteenth Amendment, the Seventeenth Amendment, and the Nineteenth Amendment contain restrictions upon the states in the matter of suffrage requirements, and the second article contains some restrictions upon the states in the choice of Presidential electors. Perhaps the most important limitations upon state legislation lie in the prohibitions in the Fourteenth Amendment forbidding state laws which abridge the privileges or immunities of citizens of the United States and prohibiting the state from depriving any person of life, liberty, or property without due process of law, or denying the equal protection of the laws.⁵ It would be difficult, if not impossible, to enumerate all the restrictions which the Constitution places upon the states. A large part of them are indirect. Whenever the Constitution gives jurisdiction to the federal government over a matter, any state law that conflicts with a Congressional act upon that matter is void. A good example is the federal jurisdiction over interstate commerce. Sometimes the federal jurisdiction is held to be exclusive, that is, no state law could be passed upon a subject even though the federal government has not acted. For example, a state law directly affecting immigration would be invalid, for the federal government has exclusive jurisdiction over the subject. The Constitution, laws of the United States in pursuance thereof, and treaties under the authority of the United States are declared to be the supreme law of the land (Article

³ See pp 297, 381, 635. ⁴ See pp 298, 301, 302.

⁵ See p 531

VI), and thus constitute restrictions upon the states in case of conflict with the state constitutions or laws. By implication, the states may not tax a federal instrumentality or interfere with the federal government in the execution of its powers.⁶

These restrictions seem to constitute a formidable array. However, the federal government is limited to those matters over which it has specifically been granted jurisdiction and to those that may reasonably be implied from these specific powers. An independent system of courts terminating in the Supreme Court of the United States is the final arbiter in most instances of the extent to which implications may be carried. The courts are the protectors not only of federal powers but of state powers. Moreover, public opinion as expressed in law is a brake upon attempts to encroach too fast upon state jurisdiction. In emergencies, an extremely broad interpretation of federal powers may be attempted, but some recession in federal activity always has set in after the emergency has passed.

State Restrictions on Legislatures

The framers of the early state constitutions had faith in representative government. They believed that through the process of election by the qualified voters there could be chosen a body of men who were competent in ability and character, and that the legislative powers of the state could be entrusted to them. It is true that "bills of rights" limiting legislative action in relation to individuals were included in state constitutions, but these applied only to certain matters which were regarded as fundamental; and they would appear to have been as much the result of abstract theory and the carrying over into local government of axioms that had been developed by the struggle with the distant British government as they were of any real fear that the local legislatures would be guilty of arbitrary actions. At any rate, the restrictions were not extensive. The people had faith in representative government.

As time went on the state constitutions came to include more and more in the way of restrictions upon legislatures. These restrictions took the form first of direct prohibitions of legislative

⁶ See p. 382.

action or of regulations upon the way in which action should be taken, and secondly, of the inclusion of legislation in the constitution itself. These restrictions were the result largely of lack of confidence in the ability and integrity of the members of the legislatures, and for this there appears to have been much justification.

The inclusion of legislation in the constitution has been the result not only of this lack of confidence but of another factor. When a matter of legislation is included in the constitution itself it cannot be amended or repealed by the ordinary legislative processes. Legislation does not often come into being except as the result of vigorous action in its favor by interested or enthusiastic persons, and usually these are a small minority. They not only want to have their pet measures enacted into law, but they want their legislation made permanent, once and for all. Placed in the state constitution it can be amended or repealed only by the process of constitutional amendment and is safe from change by the legislature, as it would not be if merely included in the code of laws. The pressure, therefore, has been to include in the constitution measures that normally would have been placed on the ordinary statute books.

Constitutional restrictions upon legislatures are many and of various kinds. The oldest type is in the form of "bills of rights." These are similar to restrictions upon Congress that are imposed by the first eight amendments of the federal Constitution. Their purpose is to protect the individual from arbitrary governmental action. Freedom of speech and of the press, freedom of religion, the right to bear arms, and the privilege of the writ of habeas corpus are familiar phrases among these restrictions. Prohibitions of ex post facto laws, laws impairing the obligation of contracts, and laws that take life, liberty or property without due process of law merely repeat federal restrictions upon the states and are not at all necessary, but the makers of constitutions evidently have felt that such traditional provisions were required to complete their conception of what the well-dressed constitution should wear. In fact, "due process of law" as now interpreted seems to be sufficient to provide all the essential restrictions of a whole bill of rights. Of course, many of our state constitutions were drawn up before the Fourteenth Amendment was adopted.

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The more recent forms of restriction vary much in their details and cover a wide range. Extravagance—and worse—in state legislatures has led to limitations upon the power to tax, the power to borrow, and the power to spend. Taxes may be required to be uniform for each class of property. Bond issues may be limited in amount, may require a higher vote for adoption than ordinary laws, and, where a fixed amount is exceeded, may require a submission to the voters. In Maryland the legislature has been denied the right to increase items in the governor's budget for the executive departments or to decrease the items for the judiciary, though it may still increase or reduce those for the legislature. Special appropriations in Maryland other than those in the budget require a three-fifths vote and must provide a way to meet the appropriation. New York State also has placed restrictions upon the appropriating power.

Further restrictions upon the legislature may take the form of limiting the number and length of sessions, evidently upon the theory that legislatures are a necessary evil which should be limited to the time required to pass essential bills and then be sent home. We know that legislatures cannot be kept out of mischief by this device, that in reality a rush in legislation makes it easier to put through bad bills and leads to the improper framing of even desirable legislation. The limitations stand as a memorial to the fond hope of the constitution-makers to check the flood of laws.

Other restrictions have even tried to prescribe rules of procedure for the legislative bodies, such as the requirement that all bills be printed before being acted upon, and that every bill shall have three readings. Such restrictions are not easily enforced. The courts are reluctant, in considering the validity of measures, to go back into their legislative history. The legislature easily sees their uselessness. In an age of printing, three readings of a bill would appear to be unnecessary and it is doubtful if in any modern legislature bills are read three times in full. The term "reading" is interpreted very loosely indeed, and may mean merely that the title was read and the reading of the bill assumed. The requirement that the vote of each member on each bill be recorded is subject to question as to both its necessity and its wis-

dom. The same is true of the requirement that a bill may not be amended by reference, in other words, that the amended parts must be repeated. This was intended to prevent the abuse of changing laws without clearly indicating what was being done. However, the requirement becomes ridiculous at times. To raise the speed limit for automobiles from thirty to forty miles should not require the repetition of a whole provision upon reckless driving. Such things should be left to the legislature, which, after all, must be entrusted with much power. Some states require that amendments refer to the amended law by number. Some require that the title properly describe the contents of an act.

Special legislation, particularly for cities and local areas, has not only absorbed much of the time of legislatures in the past but has led to serious abuses. A "special" law is, in general, one that applies to a single individual, a group in which the individuals are mentioned by name, or to a single municipality. Some states now limit in various ways the power of the legislature to pass special laws, but these limitations have been quite easy to evade, since a "special" law may be made general by applying it in terms to a whole class, and the "class" may be so defined as to be a very limited one.

The Initiative and Referendum

During the first part of the present century a wave of enthusiasm passed over the country for two devices which were designed to place a check upon legislative incompetence and corruption. These devices were the initiative and referendum, both of which are means of direct legislation, that is, legislation directly by the voters.

The referendum developed in two forms. In one form the legislature might, if it chose, pass on to the voters the determination of whether a bill should become law. In such case, at the next general election, or at a special election, the proposed law would be carried upon the ballot, and the voters would express their approval or disapproval, an affirmative vote constituting enactment just as though the measure had passed through the legislature and been signed by the governor. In the other form of the referendum, all measures, except those designated by the legislature as



emergency measures, were suspended for a fixed period, such as ninety days, after enactment. At the end of this period an act went into effect, unless a petition in the proper form had been signed by a percentage of the voters, such as five or ten per cent. In such case, the act was further suspended until it could be submitted to the electorate for a vote.

The initiative likewise developed in two forms. Under the direct initiative a proposed law was drawn up by persons interested in its enactment, and the required number of signatures was secured upon a petition for its submission to the electorate. At the ensuing election it was defeated or enacted into law. Under the indirect initiative the initiated measure must go to the state legislature before being voted upon by the people. The legislature might then enact it into law and make submission to the people unnecessary. Some states permitted the legislature to submit a competing measure, which would become law if the required number of popular votes was cast for the two proposals and if it secured more votes than the original.

One difficulty experienced with direct legislation was the small popular vote usually cast upon proposed measures, even at elections in which the vote for officers was high. Some states, therefore, required not only a majority of the votes cast upon the measure, but a percentage or even a majority of the votes cast at the election.

The initiative and referendum are no longer regarded as panaceas for legislative incompetence. While they remain in the constitutions of states which had adopted them, there have been no recent additions to the list. On the whole, the voters, even though intelligent, are not qualified to pass upon the quality of proposed laws, for they have not the time to devote to their study. Moreover, there is no such opportunity in direct legislation for perfecting a measure by amendment as there is in the case of measures which pass through legislative bodies. Even the competing legislative proposals sometimes accompanying the indirect initiative are not a sufficient substitute for the usual legislative process. For these and other reasons direct legislation is not now regarded with special favor as a measure of reform.

Length of State Constitutions

The various direct restrictions upon legislatures, combined with the tendency to write statutes into the constitutions themselves, have led to an unnecessary lengthening of the fundamental instruments. They are monuments to the suspicion with which the American people have viewed their legislatures. Little of this constitutional expansion has led to good results, and most of it has been pernicious. Rather than hedge the legislatures about with restrictions, it would appear that a better plan would be to work out a system of government that is simple and open to observation and then to entrust the legislatures with the necessary powers. Permanent stability and good laws will result only through the development of self-restraint upon the part of the legislatures, not through checking them by constitutional and judicial restrictions.

The Amendment of State Constitutions

In view of the large amount of matter in state constitutions which is of a statutory rather than of a fundamental nature, there is a tendency for the amending process to be made rather easy, approaching that followed in the enactment of ordinary statutes. In general, there are three methods of amendment followed in this country.

First, there is the method of amendment through the use of a constitutional convention. This is a body elected by the people of the state for the express purpose of proposing amendments. Amendment through the use of a constitutional convention is permissible in every state except Rhode Island. Ordinarily the proposals of a constitutional convention must be submitted to the voters for ratification, but there are a few state constitutions that were adopted by conventions without submission to the people, and in Delaware the adoption of amendments by the convention completes the process. When a whole new constitution is submitted to the people it may be defeated because of a few controversial proposals. Sometimes, therefore, the controversial parts are submitted separately, or each part of the constitution is submitted independently.

Another method of changing state constitutions is by legislative proposal. Ordinarily this requires something more than a simple vote of both houses of the legislature. A two-thirds vote of the membership or passage by two successive legislatures are common requirements. In Delaware, passage by a vote of two-thirds of the total membership in each house in two successive legislatures completes the process, but in other states the proposals must be ratified by the people.

A third method of amendment, found in some states, is through the initiative. Under this plan, a proposed amendment is drawn up, and a petition is signed by a fixed number or percentage of voters, after which the amendment is submitted to the people for ratification.

Ratification by the people under any of these three methods may be by a majority of those voting upon the proposal. However, it is sometimes required that it be by a higher vote, as by a majority of all the votes cast at the election at which the proposal is submitted to the people. Since the vote upon officers is likely to be much heavier than that upon amendments, this makes amendment more difficult. Some states have set up other requirements, such as limitations upon the number of amendments that may be proposed each year, or other restrictions that make amendment more difficult.

Ordinarily, amendment by use of a convention is considered best when a whole constitution is being revised, while the other methods are more applicable for single proposals.

ORGANIZATION AND PROCEDURE

Uniformity

The organization of our state legislatures is similar to that of the federal Congress. It is remarkable that our state governments have shown so little variety in form, so little experimentation. Mechanically we are an inventive people. No other large country produces so many patents per head of population as does the United States. Nor have we been sterile politically, for we have conducted a great experiment in democracy and have contributed much to the theory and practice of federalism. In re-

cent years we have conducted some successful experiments in city government which now are being tried out in the government of counties. But our state governments present, at least in broad outline, a vast and monotonous uniformity. The same bicameral legislatures, the single executive, the veto, the senatorial approval of executive appointments, the familiar variations upon the system of checks and balances—all these and many more are faithfully reproduced from the federal plan. Nebraska is the only state with a unicameral legislature. Why has no state experimented with a cabinet system? With forty-eight opportunities it would seem remarkable that no cabinet plan has been tried.

Foreign observers have been struck with the great uniformity in American life. The cities and local areas of Europe have distinct histories and are impressed with individual differences. Their architecture, their customs, their ceremonies, and their habits vary from locality to locality. In comparison, American life is uniform and national. Naturally, the state governments conform to the social uniformity. However, there are other factors that have tended to the same end.

Bicameral Form

All of our states, with the single exception of Nebraska, have a bicameral legislature. The prevalence of the bicameral form in this country can be traced back in part to the organization of the trading companies that constituted the governing bodies for some of the colonies, in part to the need to represent both the interest of the Crown and that of the colony, and in part to the influence of the British example. Before the two-chambered form became universally accepted there was some experimentation with the unicameral idea. Pennsylvania, Vermont, and Georgia each had at one time or another a single-chambered legislature. After 1836. when Vermont turned to the bicameral form, no state attempted the unicameral plan until 1934, when Nebraska adopted an amendment providing for this form. The first legislature in Nebraska under this amendment, composed of a single house of forty-three members, met in 1937. There has been no need to represent in different chambers two classes or groups of interests within the states. The classes that formed the basis for the British system have not existed here, and there has not been the same need to represent local areas as against population as in our federal system, although there has been some conflict in the states between rural and urban areas. The influence of tradition and the belief in a bicameral system as inherently better than a single chamber were perhaps the most important influences. Beyond this, most of our states have developed from territorial governments provided by Congress with a uniform pattern which included the bicameral idea. No doubt, too, the inhabitants of a prospective state believed that their desires for statehood were more likely to find favor with Congress if their proposed constitution followed the established model.

So much of the work of a state legislature is administrative or ordinance-making in nature that there would appear to be little need for the more cumbersome bicameral system. In fact, some gain should result from concentrating power in a single chamber which could then be observed more easily, and responsibility for legislation could more certainly be fixed. In a number of states of the West and mid-West there have been proposals for a unicameral system. Experience with the unicameral legislation of Nebraska has been too short to reach definite conclusions upon its actual results, but the Nebraska experiment will be watched with interest.

Powers of Each House

In giving special powers to each house the states have followed the national model. The Senate usually has the power to approve major appointments of the governor, and to try impeachments. The lower house has the power of impeachment and sometimes the power to initiate financial bills. The latter provision is not of great importance, since tax bills can be amended by the upper house, and, moreover, where a budget system has been adopted, the real initiative is taken by the administration. The lower house always has the power to choose its own presiding officer, while the upper house usually has a presiding officer provided for it in the person of a lieutenant governor.

One important difference between the state legislatures and

Congress lies in the fact that in the states the houses do not develop the esprit de corps that appears in each of the houses of Congress. In Congress each house is jealous of its rights and resents any encroachments by the other body. In the states this attitude of rivalry does not appear.

Differences between the houses upon legislation may be settled by means of informal discussions or through conference committees. In some states at least, the use of conference committees appears to be the recognized and common method of bringing about agreement upon bills.

Capitol Buildings

The buildings in which our legislatures meet show a surprising repetition of the dome and wings idea of the federal Capitol. In many instances the interiors are rather ornate in comparison with the simplicity in Washington. Seating in concentric rows follows the plan that seems to prevail in all countries except Great Britain and the British colonies.

Sessions

In five of the states, sessions of the legislature are held annually. Alabama finds one session in four years sufficient. The remainder have sessions every two years. January of the odd years is the customary month for meeting. Members of the lower house in most states are chosen for a two-year term, which corresponds to the customary provision for biennial sessions, and this means that each session meets with a newly elected group of members, many of whom are serving their first term. Members of the upper house usually are chosen for a four-year term.

In some of the states of New England sessions begin at such times as the legislature itself may determine. In most states the constitution fixes the time for the beginning of regular sessions, leaving to the governor power to call special sessions. In a few states special sessions must be called if demanded by a fixed percentage, such as two-thirds or more, of the members of the legislature. When special sessions are called by the governor the legislature usually is limited to the subjects specified by him, al-

though in a few states impeachment cases may also be taken up, and, in some, other subjects may be considered under special restrictions.

Over two thirds of the states place an absolute or conditional limit upon the length of the legislative session. The limit varies from state to state. Sixty days is the period most frequently prescribed. In some, the legislature may continue in session after the expiration of this period on a reduced compensation, or with no compensation, or until a fixed maximum of compensation is reached. In some, the limit may be exceeded by a two-thirds or three-fifths vote of the total membership of each house. In other states the limit is absolute and the legislature may continue in session under no condition.

The question naturally arises as to why the legislature should be permitted only this short time to attend to the large volume of very important work that it must perform. Sixty days out of two years is entirely too short a time to consider the needs of a state. The theory back of the limitation, as previously mentioned,7 seems to be that if the legislature should have more than the minimum time necessary to perform its work, it would direct its attention to passing bad or unnecessary legislation—that idle legislative hands would turn to mischief. Another reason is that compensation is on a per diem basis in a large number of states, and the shorter the session the lower will be the cost to the state in legislative pay. This latter could be corrected by the payment of annual salaries, and the pay should be large enough to enable poor men to devote full time to the work of legislation. No reasonable sum is too high to pay for good laws, but poor legislation results in much waste of the people's money.

The short term really aggravates the very evil that it is intended to correct, for most of the legislation is reported from committees toward the end of the session, there is a great congestion of business at that time, and it is during the confusion thus caused in the closing days that selfish interests secure what they want. No state has yet applied to its legislature the plan followed by city councils of holding frequent meetings throughout the year. With modern means of communication at least some of

⁷See p 310.

the smaller states might find such a plan practicable. With this plan there would be no late-session rush.

An attempt to solve the problem of the late-session rush appears in what is known as the "split session." This plan has been in operation in California by constitutional provision since 1911. There, the legislature meets for a period of not over thirty days, then adjourns for a period of not less than thirty, and then meets again for the second part of the session. During this second part of the session, bills may be introduced only by the consent of three-fourths of the membership of either house. The plan contemplates that bills will be introduced during the first part of the session, that members will study the bills and discover the opinions of constituents during the period of recess, and that the third period will then be free for the orderly discussion and passage of legislation. Opinions upon the results of the California plan are divided. A very similar split-session plan was tried out in West Virginia but was abandoned in a few years. In 1032, the constitution of Georgia was amended to provide for a split session.

Exceptional among our legislatures is that of Massachusetts. In this state there is no late-session rush, and this enviable result has been achieved without the aid of specific constitutional provision. The legislature itself has adopted rules of procedure that have effected an orderly consideration of all proposed legislation.

In Massachusetts, bills must be introduced during the first few days of the session. If delayed beyond five o'clock on the second Saturday, introduction may take place only by special permission and this is very difficult to secure. Committees are required to report upon bills referred to them by the second Wednesday in March, but this time may be extended to the second Wednesday in April. Since the legislature meets in January, the committees could not give proper consideration to all bills in this time were it not for the time-saving joint committee system and the wholesome traditions in this state which demand reasonable expedition in the handling of proposed legislation. Bills not reported by the expiration of the time limit are referred to the next annual session unless present consideration is demanded by a four-fifths vote. There are some classes of bills that are excepted from the rigid

time limits referred to above but the great mass of legislation must meet all these requirements. Since there is no limit upon the length of sessions, there is ample consideration of measures reported by committees.

Procedure

The procedure of state legislatures in general does not differ greatly from that of the houses of Congress. Bills are introduced by the members, although sometimes committees may do so, and in some states the budget is introduced by the governor. In an effort to obviate various abuses state constitution-makers have included many provisions dealing with details of procedure. The requirement that all bills be printed, that all bills go through three readings, that there be a record vote on every bill showing the vote of each member, that amendments must refer to previous legislation by number, that laws may not be amended by reference, and that the title should properly describe the contents are common restrictions. However, all such restrictions are subject to evasion The courts have been divided as to how far they will go in enforcing restrictions. Some courts will not go into the question of the validity of a bill unless its invalidity can be discovered by an examination of the bill itself. An example of a requirement that such courts might enforce would be one that limited a bill to a single subject. Other courts will examine into matters that require reference to the legislative records. An example would be the requirement of three readings. Even these courts, however, do not go back of the signature of the officers of the legislature. If the records say that three readings took place, the courts do not attempt to determine whether they actually took place or not. By unanimous consent the legislature can ignore a constitutional rule of procedure, but the record still shows that all requirements have been met.

Voting

Some states have experimented with such time-saving devices as electrical vote recorders. The New York legislature frequently uses a procedure known as the "short roll call." Under this, the

clerk calls the name of the first man on the roll, the names of the majority and minority leaders, and the name of the last man on the roll. The votes of the two leaders carry the votes of their respective followers.

Rules

In general, the rules of state legislatures follow rather closely those of the national House of Representatives. Each state has its own pecularities, but the general pattern is distinguished by its uniformity rather than by its variations.

Names

The legislative body of the states is usually referred to in informal speech as the "legislature." The term "Congress" is left for the national legislature. The official name for the state legislature varies. The terms "Legislature" and "General Assembly" are common. "Legislative Assembly" is used in some states and the old term "General Court" is adhered to in Massachusetts and New Hampshire. The upper house is known universally as the "Senate." The lower house is usually the "House of Representatives," but the terms "General Assembly," "Assembly," and "House of Delegates" appear in some states.

MEMBERSHIP AND ELECTIONS

Szze

The membership of our legislative houses varies greatly, butthe upper house is always smaller than the lower. Senates run
from seventeen in Delaware to sixty-seven in Minnesota. Most
run between thirty and fifty. Lower houses run from thirty-five
in Delaware to over four hundred (varying from session to session) in New Hampshire. Connecticut, Vermont, and Massachusetts rank next in size to New Hampshire, with lower houses of
around two hundred and fifty. From around one hundred to one
hundred and fifty seems to be the most popular size. Some states
require decennial reapportionments. Where the constitutions do
not fix the number of members there is a tendency for the legislative houses to increase in size, since no section of the state desires

to surrender members to sections that have grown faster, and also since members whose seats would be endangered do not want to risk a change.

Qualifications

Either directly or by implication state constitutions appear usually to require that members of the legislature have the qualifications of voters. In addition, age limitations frequently are fixed. For lower houses the minimum varies between twenty-one and twenty-five years, while over half of the upper houses have a minimum of twenty-five or above and a few require that members be at least thirty. Nearly all the states require that members of the legislature be residents of their districts and most require that they be residents for a fixed period, such as one year. Property qualifications for office were common in the colonies, and the principle was carried over for a time after independence. All property qualifications for legislatures have now practically disappeared The only exceptions occur in a few Southern states where the ownership of property may be presented as an alternative to the educational test for the suffrage. Since the members usually must have the suffrage qualifications of voters, property ownership in such states may thus become an alternative qualification for membership. Religious qualifications have disappeared. At times unusual disqualifications have been set up in connection with election to the legislature, such as the disbarment of bankers in Florida in its early state history. Crime constitutes a disqualification, the type of crime varying in the different states. Legislative seats are "incompatible" with many state offices, so that the same person may not hold both, the number and variety of incompatible offices varying from state to state.

Membership

Lawyers and farmers predominate in our legislatures. Young lawyers are likely to have a considerable amount of free time which they can use in electioneering activities. This gives them wide contacts and valuable publicity, while service in the legisla-

ture carries a prestige which is useful in subsequent law practice. Lawyers, who frequently have a penchant for speechmaking, find politics congenial. Election to the legislature may become a steppingstone to higher political preferment. The large number of farmer-legislators may be accounted for in part by the fact that legislatures meet during a slack season for farmers, beginning their sessions in January and continuing frequently for not over sixty days.

While lawyers and farmers predominate, the legislature otherwise presents a varied representation of groups and interests. The distinguishing characteristic of the legislature as a whole is inexperience, especially in the lower house. Meeting for a single session of a few weeks, and this usually only every other year, there is little opportunity to acquire expertness. Moreover, the turnover is great, so that each legislature presents a new group of inexperienced men who have everything to learn. The terms of members of the upper house usually are longer than those of the lower house, and it is the practice often to elect to it former members of the lower house. Upper bodies, therefore, have a more experienced membership, although the criticism of the lower houses in this respect applies to them only in a somewhat less degree. The small compensation makes it necessary for the members of both houses to keep in touch with their personal interests even during sessions. Of necessity, therefore, our legislators are inexpert in legislation and comparatively uninformed upon the economic and social problems that are presented to them. This, rather than venality or stupidity, is the most serious weakness of the members of our legislative bodies.

Elections

The members of both houses are chosen by popular election. Candidates are put forward by conventions or direct primaries within each district. Contested elections are decided by the house concerned without appeal to the courts. No house can be controlled by statute or by the rules of a previous body in the exercise of this right.

Districting

In most states members of both houses are chosen from single-member districts. This calls for two sets of districts, one for each house. In a very few states a single system of districts is used. In such cases the county may be used as the unit, all members of each house to which the county is entitled being chosen at large. Illinois uses special districts, each choosing one senator and three representatives at large.

In order that shifts in population may not bring about differences in the population of the districts it is necessary that reapportionments be made from time to time. Some states require a reapportionment after each national census, making use of the federal figures. County lines usually are followed in making reapportionments, and usually it is provided that in apportioning for the lower house no county may be divided unless it contains two or more districts. A considerable number of states give to each county at least one member of the lower house even though it is not entitled to a member on the basis of population. It is usual to require that districts be of contiguous territory, so that separated tracts may not be put in the same district.

Ordinarily the redistricting is done by the legislature itself "Gerrymandering," previously discussed in connection with redistricting for Congress, also appears in redistricting for the state legislature. The requirement that no county may be divided except where it contains two or more districts makes gerrymandering more difficult, although in itself it compels inequalities, since counties vary in population. In a few states the redistricting is in the hands of the governor or an administrative board, or, where a county is to be divided into two or more districts, it is left to the county board or to a court. Constitutional requirements concerning reapportionments are enforceable by the courts, whether the redistricting is made by the legislature or another body, but much discretion must necessarily be left to the apportioning body, so that only flagrant departures from the constitutional requirements are likely to be nullified in the courts.

There has developed a conflict between the rural and the urban

⁸ See p. 84.

areas in this country in the matter of representation. The rural areas, dominant in the beginning, have been loath to surrender to the increasing urban population its proportionate representation in the legislature. The discrepancies are greatest in New England, where small townships usually have at least one representative, while large cities are not permitted a proportionate number. In Connecticut no town may exceed two representatives. In Rhode Island no city may have more than one fourth the membership of the lower house. In Rhode Island each town or city has one representative in the upper house. In some states each county elects one senator. Large cities are discriminated against everywhere. In justification it is argued that no single city, however large, should be permitted to dominate a whole state.

America has not been alone in developing these geographical inequalities in representation. In England, especially just before the reapportionment act of 1832, shifts in population from rural areas to industrial towns led to great inequalities, since representatives were fixed for each district. The greatly overrepresented areas were centers of corruption and were called "rotten boroughs." The term "rotten borough" is sometimes now applied to our overrepresented areas.

The system of choosing representatives from single-member districts is an improvement upon the method of choosing them "at large" from the whole state in that it makes it more likely that the minority party of that state will elect some representatives. This can be seen by observing the effects of the present method of choosing Presidential electors. The latter are chosen "at large" from each state. In a state that has ten Presidential electors, each voter may vote for ten men from that state. If, then, there are more Democratic than Republican voters in that state, the ten Democratic electoral candidates will receive more votes than the Republicans, and all ten Democrats will be elected. If, however, the ten electors from that state were chosen from single-member districts, there might be a different result, for the Republicans, in a minority in the state as a whole, might nevertheless have a majority in a few of the districts. In this way the district system permits some representation to the party that is in a minority for the state as a whole. This, however, is dependent upon the geographical distribution of membership in the party. If the state minority party happens to have its membership so distributed as to give it a majority in some districts, it will elect representatives from those districts. If its membership is scattered over the state, it will be no better off than under the system of choice at large. In addition, the district system is subject to the weakness that through gerrymandering the minority party may be deprived even of the advantage of local majorities.

Minority Representation

A number of plans have been devised to bring about a better representation of minorities. Of course, they apply only to elections involving several offices of the same kind, such as the seats in the lower house of a state legislature, or the seats in the upper house.

One of these is known as "limited voting." Under this plan a number of representatives are chosen from one district, but each voter is given fewer votes than there are seats to be filled and these votes must be cast for different persons. Thus, if there are three seats from a district, and each voter has only two votes, it is likely that the majority party will elect two men and the minority party one. Only in the event that the minority party scatters its votes sufficiently to allow three members of the majority party to be elected, or in the event that the majority is overwhelmingly numerous and well organized will the plan fail to give the minority one of the seats. The chief objections to the plan are that it leads to an arbitrary division of seats between the two major parties and that it does not easily provide for a third party. Spain. Portugal, and Japan have used systems of limited voting. In this country it has received a very restricted use in Pennsylvania and in two or three Eastern cities.

Another plan is known as "cumulative voting." Under this plan several districts are thrown together into one, electing say ten representatives, and each voter may cast as many votes as there are seats to be filled. He may cast these votes all for one person or distribute them among several in any way he pleases. A party, therefore, that is sufficiently well organized will instruct its

members to give their votes to such persons as the party believes it can elect. A party that includes in its ranks only one tenth of the voters in a district with ten seats would be wise to concentrate all its votes on one man, while larger parties would give their votes to more men in proportion. The objections to this plan from the point of view of securing proportionate party representation lies in the practical impossibility of predicting what the party vote will be and in the difficulty in controlling the votes of the membership. Cumulative voting has been used in the choice of members of the lower house in Illinois.

The most effective solution of the problem of minority representation is known as proportional representation. Although plans of proportional representation had been advocated many years before, notably by John Stuart Mill, progress in the way of adoption was slow until after the World War. At the present time, however, some form of proportional representation is applied in nearly every country of continental Europe There are two main forms. One is known as the Hare plan, most popular in Anglo-Saxon countries, where its most general use is in the choice of boards of directors of some private corporations. The other is the List system, and it is various forms of this system that are found in continental Europe.

In the Hare, or "single transferable vote" plan, there will be several seats to be filled from a single district. Of course, they must be seats of the same kind—as seats for the lower house, or for the upper house. The voter places a "r" after the name of the candidate of his first choice, a "2" after the name of the candidate whom he next prefers, and so on, having as many choices as he desires. This is all the voter need do, and his problem, therefore, is not a difficult one. After all votes have been cast, a "quota" is obtained by dividing the total number of valid votes cast by the number of seats plus one and adding one to the quotient thus obtained, disregarding fractions. The "quota" is the number of votes that any candidate must receive to be elected.

The reasoning behind this method of obtaining a quota is as follows: With only one seat to be filled, the smallest number of votes that would assure the election of any candidate would be a majority, that is, one more than half. However, this is merely another way of saying that the number of votes required for election is the number of votes divided by two (one seat plus one) with one added to the quotient. It is necessary to add one to the quotient, for otherwise, in this instance, the quota would be half, and this would not be sufficient, for two persons might each receive half the votes, whereas there is only one seat. On the other hand, one person and only one, can receive one more than half the votes. With two seats to be filled, the quota would be one more than a third, for two persons and not more than two persons can receive one more than a third of the votes. And so on. The quota is the smallest number that will go into the total number of votes no more times than there are seats to be filled.

After the quota has been determined, the votes are distributed among the candidates according to first choice as indicated on each ballot. If any candidate receives the quota, he is elected. If he receives more than a quota, the surplus votes are taken out (by chance) and are distributed according to the next choice as indicated on each ballot. These ballots are added to the first choices of the candidates to whom they go, a ballot on second choice being equal to one on first choice. If, after surpluses have been distributed, there is no remaining candidate with a quota, the candidate with the lowest total is eliminated and his votes are distributed according to the next choice. The process of distributing surpluses and eliminating the lowest candidate is continued until all the seats have been filled. Thus, the Hare plan is really a system under which the voter in effect indicates on his ballot: "If, when you come to my ballot, the candidate whom I most prefer has received enough votes to elect him, I want you to give my vote to the candidate whom I next prefer, and so on."

The above is a simple form of the Hare system. There are many proposed variations more complicated in character, so framed as to express even more accurately the voter's desire, eliminating the element of chance.

The List system is used in Continental Europe. In its simplest form the voter would merely vote for the party. After the votes were cast, the quota would be divided into the vote for each party to determine what number of seats that party was entitled to. Then counting down from the top of a list previously pre-

pared by the party, a sufficient number of candidates to fill the number of seats won by that party would be declared elected.

The plan for determining a quota under this system (known as the "d'Hondt plan" after its originator) is to divide the total vote for each party first by 1, then by 2, and so on, and then after listing the resulting quotients in order of size, the largest at the top, the quota is the one reached by counting down from the top as many quotients as there are seats to be filled, as:

| Party A | Party B | Party C |
|---------|---------|---------|
| 9,000 | 7,500 | 8,050 |
| 4,500 | 3,750 | 4,025 |
| 3,000 | 2,500 | 2,683 |

List the quotients in order of size: 9,000, 8,050, 7,500, 4,500, 4,025, 3,750, 3,000, 2,683, 2,500. If there are seven seats to be filled, the quota is 3,000. This gives Party A three seats, Party B two seats, and Party C two seats. This can be explained in the above example as follows. If there were only one seat, it should go to Party A, as it has the largest vote. If there were two seats, both going to Party A, that would mean that each of two blocks of 4,500 voters in Party A would have a representative, whereas 7,500 in Party B and 8,050 in Party C have no representative. Obviously, the second seat should go to Party C, for there is the largest unrepresented group. If, then, the third seat went to Party A, it would have two, and groups of 4,500 would be represented; if it went to Party C, it would have two, and groups of 4,025 would be represented, whereas Party B has 7,500 unrepresented. Obviously, Party B deserves the third seat, and so on. It is merely a plan of giving the next seat to the next largest unrepresented group of voters. In practice, countries that use the List plan permit the voter to express some choice in the order of candidates on the list or even permit "splitting the ticket," and these plans complicate somewhat the counting of votes. The List plan recognizes political parties as such.

The purpose of all of these plans is to make the legislature as accurate a representation of the electorate as possible, a kind of microcosm of the electorate. If adopted in the United States, it would have the additional advantage of tending to break down

the idea that a member of Congress or of the state legislature should represent a certain district rather than the whole country or the whole state. On the other hand, probably it would break up the legislature into many parties, no one of which would be in a majority so that it could be held responsible. It has been most popular, therefore, in those countries that are accustomed to a multi-party and not a two-party system such as we have in America. No political divisions except a few cities have proportional representation. There is no substantial group advocating its adoption for the national Congress.

With the district system there has grown up in America the idea that the representative should care for the particular interests of his district and even the individual interests of constituents. A member of the state legislature is not looked upon as the representative of the state as a whole so much as the representative of his own district. He is expected to vote with his district primarily in view, to secure appropriations that will be spent in it, and to secure offices for deserving local members of his party. Since he is expected to represent primarily his own district, there has grown up the custom of choosing only residents of the district. It is seldom that a nonresident is elected from a district, although in a large town which contains several districts sometimes a member from another part of town may be chosen. In Great Britain there is much less emphasis upon this idea of choosing only local residents. A candidate who cannot carry his own district may stand for another. A valuable man is not lost to the country merely because his district has produced two able candidates. His political party will support him for another district. The British idea emphasizes value to the party, as against the American idea of value to the district.

Privileges

Members of state legislatures enjoy privileges very similar to those of members of Congress. Usually they are exempt from arrest while attending or on their way to the legislature, except

⁹ See p 437.

for serious crimes. In some states they are exempt from civil suits. Usually they cannot be questioned for remarks made in debate on the floor. Expulsion of a member from his house commonly requires a two-thirds vote of the total membership of that house. Salaries are small and sometimes are upon a per diem basis, being discontinued or reduced after the session has gone beyond a fixed number of days. In some states the legislature fixes the salary but ordinarily may not change the salary for the existing term. Other states fix the salary in the constitution. In many states the salary is augmented by compensation for mileage to and from the session. Clerk hire, office allowances, and other incidentals may supplement the salary or provide useful patronage. Committee chairmen, especially, may derive benefit from these incidental allowances.

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CHAPTER XVII

The Governor and the Administrative System

The Colonial Governor

The chief official in all our state governments is the governor. The office goes back to colonial times and has had a varied history.

In the colonial period the governor was the link between the colony and the king. Everywhere, except in Connecticut and Rhode Island and for a period in Massachusetts Bay and Plymouth, he was appointed by the Crown or by the proprietor with the approval of royal officers. Thus, the governor's duties had two aspects. On the one side he was the representative of the Crown, and on the other he was the official head of the colony His position was one of great power and importance.

The governor enforced the laws of the colony and the laws and decrees of the home government. He appointed the chief officials and was the head of the military forces. In relations with outside authorities he represented the colony as a whole. In most colonies, he appointed the members of the Council, over which he presided. The Council performed three chief functions: It was an advisory body to the governor; it acted as the upper house of the colonial legislature; and, as a court, it heard appeals in civil cases. The governor called the legislature into session, prorogued or dissolved it at will, and possessed the power of absolute veto. Beyond his actual powers he also exercised an influence which was derived from his social position as the representative of the home government and the head of the colony. This social influence meant much in the colonial period.

However, his powers were not exercised without restraint. Taxes could be laid only with the consent of the legislature, and

the power to grant or refuse taxes gave to the representatives of the people a weapon which was used with great effect in the struggle between governor and legislature that seems to have been general throughout colonial history. In this conflict the representatives of the people were gradually gaining the upper hand.

The Revolutionary Period

By the opening of the Revolution the governor had become the symbol of tyranny, and when independence was declared and new state governments were set up, the new constitutions placed the seal upon the declining powers of the governor and recognized the ascendency of the legislature. The governor was chosen by the people, or by the legislature, or by a single house of the legislature. Executive councils, chosen by the legislature or by the people, were set up in many of the states as checks upon the governor, and in some the executive council, with a president chosen by itself, replaced the governor entirely. The term of the governor was limited to one year in every state except New York, where the term was three years. In New Hampshire for a number of years the constitution did not provide for an executive in any form.

In elevating the legislative branch at the expense of the executive, the Revolutionary constitutions took the last step in the process, begun in the colonial period, of reducing the power of the executive, and were a reflection of the antagonisms that had been engendered in the long struggle with the representatives of royal power.

The First Half of the Nineteenth Century

The first half of the nineteenth century was characterized by the rise of democracy and a decline in popular confidence in the legislature. The governor grew in influence, and to some extent it was at the expense of the legislature. However, the growth in relative importance of the governor was due as much to losses of power by the legislature as to any absolute gains by the governor.

The legislature, which, during the Revolutionary period, had been looked upon as the primary branch of government, suffered

its loss in public confidence as a result of legislative waste and corruption. As a check upon the legislature there was an increasing tendency to grant a veto power to the governor. This veto was a qualified one, but again there was a disposition to require as much as a two-thirds vote of the two houses to overcome it. The governor gained also through the abolition of executive councils in some of the old states and through the failure in most new states to provide for a council. In addition, the term was increased from the one year customary in Revolutionary constitutions, to two, three and even four years.

The growth of democracy in this period was evidenced in the election rather than the appointment of officers. Through this movement the governor gained independence from the legislature. for in every state he came to be elected. At the same time he acquired added prestige as the choice of the people. However, this same movement for elections prevented the governor from becoming the real head of the state administration, for the officials who were legally the subordinates of the governor were in another sense his equals, since they also were elected representatives of the people. Even where the governor had a power of appointment his nominations were likely to be subject to the approval of the Senate. Thus, during the first half of the nineteenth century the governor remained weak, cutting not much more of a figure than his predecessors of the Revolutionary period. He lacked both the political powers of the colonial governors and the administrative control possessed by his successors in our own times.

From the Middle of the Nineteenth Century to the Present

Since the middle of the nineteenth century the office of governor has been growing further in importance. Even yet, he is not so definitely the head of the administration in the states as is the President in the federal government. However, he has become a powerful figure in state administration. Because of improved budgetary systems and the item veto, he has in many states acquired a dominant position in state finance, and aggressive governors even have assumed a leadership in legislative matters.

Qualifications

Qualifications for the office of governor vary somewhat. Common requirements are United States citizenship, residence within the state for five years, and an age qualification of thirty years However, in some states the qualifications of an elector (voter) are sufficient. As a matter of fact, such formal qualifications are of little value. There are so many other qualifications of a good governor which must be left to the judgment of the electorate that the questions of age, citizenship, and residence might also be left free from fixed conditions. In practice, governors usually not only are beyond the minimum age but have been active in state politics longer than the minimum period of residence. However, if the voters should prefer a governor who had lived in the state only one year, or even should go outside the state to pick a man who had never lived in that state or been involved in its politics, it would probably be an evidence of an exceptionally healthy state of the public mind. Such freedom from local bias is not likely to occur in this country.

Present Status of the Office

Nearly all governors have had previous experience in public office, commonly as members of the state legislature. Most hold college degrees. As usual in American politics, the legal profession predominates. In the recent period some states have been fortunate in securing as governors men of outstanding ability. Such men as Governor Alfred E. Smith of New York and Woodrow Wilson of New Jersey have brought added prestige to an office that had been growing steadily in dignity. Within the last few years, however, the governor has suffered some eclipse through the increasing influence of the President of the United States in matters previously regarded as state matters. Federal appropriations to the states, allocated by the President or administrative subordinates, make the President a powerful force in state politics. To retain their influence governors must give evidence of success in obtaining funds for their states. The reduction of governors to the status of lobbyists in the cause of federal grants no doubt has had some adverse effect upon the dignity of the office.

The Governor's Term of Office

In New Jersey the governor's term of office is three years, and the remainder of the states provide for two- and four-year terms in about equal proportions. Nominations are made in direct primaries in some states and in conventions in others. Election is by direct popular vote except in Mississippi. Some early state constitutions required a clear majority for election, and where this was not secured, the decision went to the legislature, but at the present time election is by plurality in nearly all the states. Mississippi uses a combination of direct election and an electoral college, with appeal to the lower house of the legislature when no candidate receives both a majority of the popular and electoral votes. However, the votes of the electoral college are cast automatically for each district in accordance with the popular vote in the district.

The Governor's Salary

The British practice of placing unpaid officials without salary in positions of dignity has not prevailed in this country. All American governors receive a salary, although frequently it is ridiculously low. Most states pay as much as \$5,000 or \$6,000 a year, and New York has gone as high as \$25,000. In addition to salary, however, some states provide an official residence and some allowance for expenses. The aim has been to pay a salary sufficient that a poor man can afford to accept the office and yet not high enough to make it attractive for the salary alone. It is questionable whether a low salary is sufficient to bar undesirable candidates, since unscrupulous men would desire the office for the opportunities it affords for various forms of graft rather than for the direct return in salary.

The Removal of Governors from Office

State constitutions usually provide for the removal of governors by impeachment in the lower house and trial in the upper house.

¹ See p. 443

Impeachment, however, is in general applicable only where the governor has been guilty of crime. Some half-dozen governors have been removed by this process. A few states provide also for removal by the "recall." ²

The Lieutenant Governor

Some four fifths of the state constitutions provide for the office of lieutenant governor. Except in Massachusetts, states having a lieutenant governor make him presiding officer of the upper house. Usually he may vote in case of a tie, but his influence is not great. More important than this, he succeeds the governor in the event of the latter's death or removal. In a few states he may act as governor when that officer is absent, or at least he may do so when the absence seriously interrupts the business of the office. Customarily the president pro tempore of the Senate and the speaker of the House of Representatives are next in line.

The Governor in Relation to the Administration

As head of the state government the governor represents the state in its relations with other states and with the federal government. The constitutions recite that he shall have the "supreme executive power" and that he shall see that the laws are faithfully executed. Such provisions, however, are merely declaratory and have little meaning except in the interpretation of specific powers granted in other parts of the constitution.

Although he is the chief officer in the administrative system of the state, the powers of the governor in this respect are not nearly so great as those of the President in relation to the federal administrative system. The President appoints his heads of departments subject to the "advice and consent" of the Senate. He is the only elected official in the whole federal administrative system. The Vice-President is not a part of that system unless he succeeds to the Presidency. The President may remove all purely administrative officials, and this power cannot be curtailed by law. State governors, however, do not have such broad powers. The tendency at present is to extend the governor's appointive powers.

² See p. 339.

This tendency has manifested itself chiefly in relation to new offices created by the legislature. Such offices, often positions on boards and commissions, created to meet the exigencies of modern society, are likely to be technical in nature. They cannot well be filled by election. They are, therefore, left to the governor's appointive power, subject usually to the approval of the Senate.

It is in relation to the heads of the chief administrative departments of the state that the weakness of the governor is most apparent. Here he should have not only the power to appoint but also the power to control. The heads of departments are policy-forming officials. Effective administration of his office is impossible unless he controls such officials, and this means that they should be appointed by him and made subject to removal by him. A few states recently have extended the governor's appointing powers with respect to these officials, but since the offices usually are set up under constitutional provisions, it is difficult to bring about a change.

With respect to the new boards and commissions, appointment by the governor undoubtedly is a better method of choice than election. However, it is not essential, or in many cases even desirable, that the governor exercise any powers of control. When their duties are judicial or purely technical in nature they should be free from interference. As a matter of fact, the legislatures often have made this evident by providing terms that do not correspond with that of the governor, so that he does not appoint the membership of all these boards when he takes over office, and may not even appoint the majority of the members of any single commission. Where the offices are administrative rather than judicial in nature, however, there is a definite loss in effective administration through the inability of the governor to exercise control.

The power of removal is essential to control. Usually the governor does not have the power to remove the elected heads of departments. Where this power exists it is often limited by the requirement of Senatorial concurrence, and in any case, from the political point of view removal may be practically impossible, since the elected official is likely to have a powerful following in the electorate. Under these circumstances the provisions of some

constitutions placing these elective officers under the supervision of the governor are almost worthless, for the power to remove is necessary to effective supervision.

Even with respect to those officers whom he appoints the governor may not have the removal power, since the principle that the power to appoint carries with it the power to remove has not been accepted generally in the states. However, by constitutional provision or by statute the governor has been given the power to remove many officers, and this is especially effective as a means of control in the case of officers appointed by himself.

In some states the governor is given power even to remove certain local officers, especially those dealing with finances. However, practical restrictions obtain here as in the case of the removal of elected state officials. The governor cannot risk resentment by interfering in local affairs except in flagrant cases of misconduct.

The Recall

In some states an alternative to impeachment or removal by the governor is provided This is the process of "recall." In order to put the machinery of recall into motion, a petition must first be circulated and signed by a fixed number or percentage of voters. Then there is a popular vote upon the proposal. In one form of the recall there is in fact a new election in which the name of the incumbent goes upon the ballot along with the names of other candidates. The person receiving the highest number of votes is elected to the office in question. In the other form of recall the incumbent is not removed unless a majority of the voters vote "yes" upon the question whether the incumbent shall be recalled. In the event the vote is for recall, the votes upon the candidates, among which the name of the incumbent is listed automatically, are counted. The person receiving the highest number of votes is elected. Thus the incumbent may be removed upon the specific question of recall but re-elected upon the count of votes for candidates.

During the early part of the present century the recall was one of the popular measures of reform, since it presumably gave to the people a means of removing officials who had been guilty of no crime which would be a basis for impeachment, but who nevertheless were incompetent or unworthy. However, it has not in practice been found particularly effective, although it has been retained in a few state constitutions.

The Governor as Head of the Militia

Two powers possessed by the governor, the exercise of which often occurs under dramatic circumstances, are his control of the state militia and his power of pardon.

As the head of the state militia the governor uses the force of the state to maintain order where the local police authorities are unable to do so. Rioting may occur in connection with strikes and industrial disorders on such a large scale that the local power is inadequate. Under such circumstances the governor may send the militia into the area of disturbance until order has been restored. This may become a powerful weapon by which the governor intervenes in support of one side or the other in industrial conflicts. Effective picketing operations by strikers may be impaired by the presence of the militia. On the other hand, in at least one instance, a strike was in progress with the purpose of closing a plant, although numbers of workmen apparently were willing to work. The governor, however, with the power either to use the militia to maintain order or to withhold it, requested that the plants be closed so as to avoid bloodshed. In this instance the power of the governor was used to accomplish the ends of the strikers, interfering both with the manufacturer and the workmen who had not joined in the strike. In fact, whenever the governor uses the militia in industrial disorders or whenever he refuses to do so, one side or the other in the conflict is likely to be adversely affected. However, the governor's duty is to maintain order. If there are rights to be adjudicated within an industry or within any factory, it would appear that other agencies of government should be set up to determine those rights. The obligations of the governor in this respect are limited to the maintenance of the peace, whatever may be the effect upon the parties to the conflict. Unfortunately, the sympathies of the governor or his political ambitions may influence his actions.

The Pardoning Power

The power of pardon is one of the most trying of all the powersexercised by the governor. The wives and mothers of men condemned to death call upon the governor in his office and make personal pleas. Tears and supplications under these circumstances are most difficult to resist. Where convictions have been secured upon circumstantial evidence there is always the bare possibility that new evidence will be discovered at the last moment. As the time of execution draws near, the pressure upon the governor becomes greater. Former Governor Smith of New York tells of careful arrangements for telephone communication between the governor and prison officials on the night of an execution. The governor is under a most severe strain, for he has the power of life and death. Yet, he has the obligation to uphold the peace of the state for which punishment was instituted. Some governors, too soft-hearted or perhaps too politically conscious, have been unable to resist the pressure, becoming notorious for the jail deliveries that have taken place in their administrations. Recognizing the dangers inherent in decisions by a single person, some states have entrusted the pardoning power to a board of which the governor is a member.

The power of pardon embraces not only absolute pardons but reprieves, which delay the application of a sentence, commutations, which substitute a lesser penalty for the one imposed by the court, and conditional pardons, which grant the pardon only upon condition that certain stipulations be fulfilled by the pardoned man. Pardons also include amnesties, or pardons usually granted to groups of people in advance of trial. The latter are customary in reference to political offenses where the crime is not the result of moral weakness or depravity. Sometimes pardons are granted for technical reasons just before the expiration of a prison term. For instance, since an unconditional pardon in a legal sense wipes out the guilt, a pardon may be granted in order to restore the franchise where the law denies the suffrage to persons convicted of certain crimes. Since the pardoned person is restored to the status existing before conviction, the law denying the suffrage does not apply. An unconditional pardon

removes all further penalties, restores all rights taken away by the conviction, and in the eyes of the law removes all guilt.

The Governor's Powers in Relation to Bills

Although the powers of the governor as the head of the administration are inferior to those of the President in the federal system, on the legislative side his powers are more nearly analogous to, and in some instances are superior to, those of the President

Most important of all his legislative powers is the approval of bills. Constitutional amendments and referendum measures³ usually do not need his approval. Every state except North Carolina makes provision for an executive veto. The governor is given a fixed number of days, perhaps ten or less, to sign. If he disapproves, he may return the bill to the legislature with his objections. If he does not sign and the legislature is in session, the bill becomes a law upon the expiration of the fixed period. Most states have a "pocket veto" provision to the effect that if the governor does not sign and the legislature is not in session at the close of the period, the bill fails to become a law, but some states prevent the "pocket veto" by providing that bills not signed within a period after adjournment shall become law unless specifically disapproved. Some of these states require that the governor send his objections to the secretary of state and others that he return the bill to the legislature at the next session.

In connection with appropriation bills most governors possess a special power known as the "item veto," that is, the power to veto any particular item in an appropriation bill, while approving the remainder. This prevents "riders," ⁴ either in the form of legislation or appropriations. Some governors have not only the power to veto a whole item but the power to reduce an item, a power that probably is even more useful than that of vetoing a whole item.

While the item veto refers strictly only to appropriation bills, in a few states the governor is given the broader power to veto sections of any bill. Other states accomplish this same end to a

³ See p. 311

⁴See p 101

large extent by requiring that no bill shall include more than one subject, thus at least reducing the danger that subjects foreign to the main purpose of the bill will be added as riders.

Governors' vetoes are never absolute except in the case of "pocket vetoes." Repassage over the veto may be accomplished by various forms of vote in each house, such as a two-thirds or three-fifths vote of those present, or a simple majority of the total membership, or two-thirds or three-fifths of the total membership.

Governors have some powers in relation to the initiation of legislation, although they may not formally introduce bills. The requirement of a message to the legislature when it convenes and the power to submit special messages are not of great importance. In the recent period strong governors have appealed to the people over the heads of members of the legislature for support upon measures advocated by the governor. Popular pressure upon the legislature is an effective means of securing action.

The Budget

It is in respect to the budget, however, that there is the greatest tendency to extend the executive power of initiative.

It is easy for governments to fall into slipshod financial methods, for government finances are conducted in reverse from private finances. The individual must first know his income and then must limit his expenditures to that income. Mistakes may be met by borrowing, but this has definite limits. Governments, however, first determine what they need to spend and then adjust their taxes to meet this expenditure. Of course, taxation also has its limits, and too heavy taxes may destroy industry and kill the goose that lays the golden egg. But, within limits, this is the way in which government finances are conducted, and slovenly financial administration easily creeps in.

During the last quarter century there has been much experimentation with "budget systems" designed to keep government income and expenditures in better relation. State expenditures before this time had not reached large proportions. Reports upon probable income and needed expenditures might be made by state

finance departments or by the governor, but they were fragmentary and uncoordinated. No effort was made by the governor to submit an organized estimate of expenditures and probable income so that appropriations and income might be balanced. With increased expenditures and greater complexity in the tax laws, states reached the end of each fiscal year with their income and expenditures out of balance. Supplementary taxes might be necessary, or it would be discovered that deficiency appropriations were necessary.

As state expenditures grew, discrepancies became more serious, and it was generally realized that better planning and control were necessary both in keeping expenditures within limits and in balancing income and outgo. A central coordinating body was necessary. Experimentation with legislative committees and special commissions as budgetary bodies was made, but the executive budget, drawn up by the governor, is recognized as the most satisfactory type. Three fourths of the states employ the executive budget plan, while the remainder use boards which sometimes include members of the legislature.

Generally, the budget as drawn up by the governor or board is subject to unlimited changes by the legislature, subject, of course, to the veto, and especially to the item veto where this exists. It is nothing more than a report and recommendation upon finances. In an executive budget system the various departments and agencies submit their estimates and recommendations to the governor, who goes over them and, after accepting, altering, or rejecting the recommendations, is in a position to state what the expenses of the state will be during the next fiscal period upon the basis of existing law and upon his proposed changes. On the other side of the budget he can report what the probable income of the state will be under existing law and under proposed changes in the law. The primary purpose is to give the legislature the facts upon finances in a single understandable report, to include in this the recommendations of the executive, and to provide by way of recommendation a budget balanced as to probable income and expenditures. The legislature does not proceed upon finances piecemeal, but has before it the facts and a basis for discussion. At the same time

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the governor has a means of controlling, by way of recommendation to the legislature, the expenses of the various departments and administrative boards, and to some extent he secures a control even over boards otherwise independent of him. This budget is submitted by the governor to the legislature. It carries the prestige of the governor's recommendation and has the advantage of having been planned by experts in the governor's office. The legislature is free to amend it at will, but at least both the legislature and the public can see more clearly what is being done. Obviously, however, the system carries no guarantee against either gubernatorial negligence or legislative extravagance.

A few states, feeling that the recommendation of the governor should have greater finality, have placed restrictions upon the legislature's power of amendment. Maryland, for instance, has a budget system which, in general, permits the legislature to increase or decrease only the recommendations for the legislative department, to increase for the judicial department, and to decrease for the executive department. Thus, Maryland definitely puts upon the governor the responsibility for the financial condition of the state and in addition gives him a substantial control of the administrative departments.

The Governor's Powers in Relation to the Legislative Body

Governors commonly have the power to adjourn the legislature when the two houses are unable to agree upon a time of adjournment. This power, however, is one of little importance, as is also the power possessed by some governors of calling the legislature, when it is not then in session, to a place of meeting within the state other than the state capital. Resignations from either house of the legislature sometimes are addressed to the governor, and usually he issues the writs of election for filling vacancies. However, these powers are of little significance or are matters of routine.

The power to call the legislature in special session may be used not only to meet an emergency but to focus public attention upon matters which the governor considers important. In over

half of the states the legislature is limited to legislation upon matters mentioned in the call or proposed by the governor. This not only insures that other questions will not intervene to crowd out the governor's proposals but permits a more careful consideration than is likely to be given in a crowded session. However, the legislature is not generally precluded by the restrictions of the governor's call from the consideration of impeachments or the approval of appointments. A few states permit special sessions of the legislature upon request of two thirds or more of the two houses, thus permitting impeachment proceedings when desired by a sufficient number of members. In the other states the governor is free from impeachment proceedings except during regular or special sessions.

Old and New Officers

The officers of the state fall into two fairly clear groups. First, there are certain officials who perform essential governmental functions, and whose positions have had a long history and usually are provided for in the constitutions themselves. They include the governor, the secretary of state, the attorney general, the treasurer, and usually an auditor and a superintendent of education. The second group includes those officers and members of boards that have been created since the early constitutions were drawn up. Most of them have come into being as a result of the peculiar needs of modern society. For the most part they are not mentioned in the constitutions but have been created by successive legislatures as need has arisen.

The Secretary of State

Next to the governor and lieutenant governor, the official ranking highest in dignity is the secretary of state. Nearly everywhere he is elected directly by the people. In practical effect independent of the governor, he finds that his duties are fixed in the constitution or regulated by statute. He affixes the seal of the state to documents and publishes the laws, and his office is the repository of the acts of the legislature and other state papers. In many states he issues the call for elections, receives

the papers of candidates, and certifies the results. Various other functions, usually of a routine nature, are assigned to the office in different states. Recently in many states the issuance of motor licenses has been entrusted to the secretary of state.

The Attorney General

The attorney general, like the secretary of state, is usually an elected official. He is the chief law officer of the state, giving legal advice to other officers, acting as counsel for the state in civil actions, and in a general way heading the law-enforcing agencies of the state. As a matter of fact, however, the various district attorneys exercise a large degree of independence in the matter of criminal prosecutions. Below the attorney general are the district attorneys, prosecuting attorneys, or state's attorneys, as they are variously called. However, these officers are not appointed by the attorney general. Like him they are elected officials, being chosen by the people of their own districts, and he has little supervision over them.

The Treasurer

The treasurer, like the other officials in this group of old officers, is elected by the people in nearly all the states. In several states he is chosen by the legislature. In only one or two states has the governor been given power to appoint this officer. In general, his duties relate to the receipt and disbursement of state funds. For the most part, the collection of taxes is left to local authorities and to state tax commissions, although sometimes the treasurer is the collector for certain specified taxes. Usually he merely receives the state taxes after collection by other authorities. Scandals have not been infrequent in connection with this office. Since the treasurer is entrusted with the custody of state funds, he may exercise considerable discretion as to where they are to be kept. At the least, political considerations may play a part in the choice of banks for state deposits. More serious offenses are the choice of banks in which the treasurer is a large stockholder, retention of interest beyond the minimum fixed by law, and, of course, the more obvious forms of misappropriation.

The Auditor or Comptroller

As a check not only upon the treasurer but upon the governor and other officials, all the states provide for some method of auditing the state accounts. In nearly every state there is an officer known as the auditor or comptroller. Usually he is elected by the people, and in a few states he is chosen by the legislature, but in no state is he appointed by the governor. His duty may be limited primarily to a post-audit, that is, a report upon expenditures at the close of each fiscal period, with an opinion as to whether the items have or have not been expended in accordance with law. On the other hand, he may make a preaudit upon all expenditures. In this case no expenditure may be made until he has given his approval. This approval has nothing to do with the wisdom of the expenditure but is based upon a determination of whether it is authorized by law. The postaudit merely furnishes the legislature with knowledge of whether its enactments have been violated. The pre-audit checks the unauthorized expenditure before it has been made but entails the disadvantage of retarding the operations of government through necessary delays in auditing and may embarrass officials who have innocently made commitments which are ultimately disallowed by the auditor through the discovery of technical defects.

Some states assign to the auditor the further duty of examining the accounts of the counties, cities, and other local divisions of the state. Others authorize him to impose uniform systems of accounts or give him a variety of other duties more or less related to fiscal matters.

The Superintendent of Public Instruction

To this group of older officers also belongs the superintendent of public instruction, commissioner of education, or officer of similar title. His duties are discussed elsewhere.⁵

The New Officers and Boards

The newer officers and boards, constituting the second group of state officers, perform a variety of functions. Some of them

⁵See p 733

are purely regulatory bodies having jurisdiction, for instance, over safety in factories or over the practices of public service corporations. Some are themselves directly engaged in performing services such as administering state hospitals or furnishing agricultural advice to farmers. Sometimes a board performs some direct services and at the same time has regulatory powers in relation to local bodies or private persons or corporations. These new offices usually are not established by the state constitution but have been set up by the legislature as the need arose. For the most part they have been made necessary by the econnomic and social changes that set in during the second half of

The Civil War brought to a close an epoch in which the United States was primarily agricultural and in which the people lived on farms and in villages and small cities little touched by the industrial changes that now have revolutionized our national life and given us the machine age.

the nineteenth century.

Government had to adjust itself to meet the problems of the times, and it fell to the states to bear the brunt of the pressure of a constantly expanding industrialism. As each new problem arose a new office or board was created. By the opening of the new century the number of such officers and boards had reached large proportions and was growing with increasing rapidity.

As the towns and cities increased in size and number the relationship of the urban areas to the rest of the state became closer and powers formerly exercised by the local governments were taken over by the central state government, or forms of supervision were provided. Thus, the states supplemented or entirely absorbed the work of the localities in certain forms of charity and in health protection.

In addition to activities that had so grown beyond local limits as to force themselves upon the attention of the state as a whole, the state assumed the performance of other functions that previously had not been carried out by any governmental bodies or had been performed in only a most rudimentary way. As the "industrial revolution" progressed in this country it brought the same problems that accompanied its early advance in England. "Factory laws" to protect the life and health of workers became

necessary, and the relations between employers and employees had to be controlled in the interests of industrial peace. The public required protection from the exorbitant rates and inadequate service of public utilities, and the utilities needed protection from dishonest politicians. Banks and insurance companies had to be regulated in the interest of depositors and insured persons, and a multitude of other problems, all related to the economic changes that were taking place, presented themselves for solution.

Frequently a board or commission was set up in relation to a subject newly coming within the purview of the state. Where regulatory jurisdiction was to be granted involving the exercise of the legislative power of issuing regulations or the judicial power of deciding cases, the usual procedure was to set up a board or commission with powers defined in the law. Single officers heading state bureaus sometimes were provided for, especially when the legislative and judicial functions were not present.

These boards, commissions, and bureaus are performing a large part of the work of the central state governments. With the purpose of removing them from the influence of partisan politics it is customary when the board is appointive to divide the membership between the two major parties. Presumably the members of each party will watch the others to prevent the appearance of partisan influences, and nonpartisan decisions will result. As a matter of fact bipartisan boards have not fulfilled these expectations. More likely the appointing officer chooses to represent the minority party persons whose opposition is purely nominal. Sometimes the bipartisan nature of the board merely manifests itself as a division of the spoils of office. Most students of administration believe that it is better to set up technical qualifications where this is possible, and in any case to work toward the goal of an impartial, nonpartisan membership rather than place faith in a board in which one party is expected to balance the other.

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CHAPTER XVIII

The State Courts

The Burden upon State Courts

Only a small part of the legal business of the people of the United States can be brought into the federal courts. If a case does not involve a federal question, that is, a question concerning the national Constitution, a national law, or a treaty; or does not involve certain parties, such as the United States, a state, citizens from different states, foreign states or citizens, or foreign ambassadors, other public ministers, or consuls; or does not involve admiralty or maritime jurisdiction or land grants of different states, it cannot be carried to the courts of the United States. Cases that do not come within these special classes must begin and end in the state courts, and they constitute the great bulk of the legal controversies of the country. Ordinary disputes between business men, disagreements as to wills, land boundaries, and deeds, and problems affecting contracts and injuries of various sorts generally are local in nature. No federal question is likely to be involved, and the parties to the suit usually are neighbors from the same state. Thus, the burden of deciding by far the greater part of the legal disputes of the country falls upon the courts of the states.

Organization

The state courts vary greatly in the details of their organization, but in general outline they follow a uniform plan. At the top is a single court, which has for the bulk of its business appeals from the courts below it. Under it in some states is an intermediate court the jurisdiction of which varies from state to state, but which primarily takes appeals from the lower courts and in the less important cases gives a final decision. Below it are the

courts of first instance, in which most of the litigation begins. These three orders constitute the regular courts of the states. Below them are the justices of the peace. While the latter hold court, they do not constitute "courts of record" and therefore are outside the regular hierarchy of courts. In addition, the states have set up various special courts to deal with special classes of business.

The Justice of the Peace

The lowest court among state tribunals is that conducted by the justice of the peace. This official has declined much in importance. Established originally in England in the middle of the 1300's as "keepers" or "conservators" of the peace, the justices of the peace in time became an important link in the judicial system. As indicated by their title, the judicial jurisdiction of the justices of the peace in England had been limited almost entirely to criminal matters. In fact, originally their duties had consisted in the maintenance of peace and were not judicial in nature. They grew in importance through the need in rural England of local courts to deal with minor criminal matters. Prestige accrued to the office through the fact that it was held by a member of the local gentry, who received no salary or reward other than the dignity that went with it.

The office of justice of the peace was carried over into the American colonies, particularly in the South. Here again the local aristocracy took over the office. In the Southern counties, when meeting together at stated times, they constituted the county administrative body. In the judicial phase of the work of the justices, their civil jurisdiction was extended in this country.

The term "quorum court" is sometimes colloquially applied to these courts, from the Latin word in one of the phrases of the justice's commission, which set forth the number that could do business. The word "quorum" has been extended to mean the number of persons in any body who can do business.

The greater part of the present-day duties of the justice of the peace falls under two heads, magisterial functions and judicial functions. The magisterial duties are those that relate to his ancient powers as a "keeper" of the peace. In some states the

justices of the peace are called "magistrates." Their magisterial functions consist in issuing "warrants" for the arrest of offenders, fixing and accepting bail for persons who are being held for the grand jury, or, in some contingencies, committing offenders to jail while awaiting action of the grand jury. Their warrants for arrest are issued upon the basis of formal complaints. Before "binding over" an accused person for the grand jury there is a preliminary hearing, but it is not required that a complete case be made. If the evidence shows that there is probability of guilt, the offender must be held or placed on bail.

The other phase of the work of justices of the peace is their judicial function. The larger part of this pertains to minor criminal matters, involving misdemeanors and violations of local laws and ordinances. A single justice, acting alone, in such cases issues a warrant for the arrest of the accused, holds a hearing, pronounces judgment, and imposes sentence if he finds the accused guilty. The proceedings are informal and there is no jury. Penalties usually are limited to small fines and short sentences in the local jail. His decision is seldom final and there is an appeal to the regular courts

The civil judicial jurisdiction of justices of the peace in America has been extended to cover disputes involving small sums or articles of small value. The amount involved varies, but two hundred dollars frequently is fixed as a maximum. The jurisdiction of justices of the peace is seldom exclusive, that is, the cases may be brought in the lowest of the regular courts instead of that of the justice of the peace, at the will of the plaintiff. Their decisions in civil as in criminal cases are seldom final. The civil jurisdiction usually includes contracts and to some extent cases based upon "torts," providing always that the amount involved does not exceed a fixed sum. The title to real estate, whatever the value, is not left for determination to justices of the peace, for permanent records are essential in this class of litigation.

Proceedings in courts of justices of the peace are very informal. The customary rules of evidence as followed in the regular courts are ignored. The justices usually are not lawyers. Their

¹ See p 360.

guide upon the law is the state code and their decisions are not based upon legal subtleties. The court of the "J P.," as he is called, affords much amusement to trained lawyers. The justification for the justice of the peace is the need in rural communities for local courts, easily accessible, to try minor cases with little expense. There is a tendency in cities to substitute for them special minor courts with trained judges. With greater concentration of population and improved means of communication there becomes less need for the justices of the peace.

In addition to possessing the powers mentioned above, justices of the peace may perform civil marriages and administer oaths. In Tennessee, Arkansas, and Kentucky they constitute collectively the County Court, sitting as the governing board for the county, authorizing bond issues, building roads, acting as the county school board, and performing the other administrative duties of a county board. This plan of a County Court as an administrative body at one time was prevalent throughout the South.²

In most states the justice of the peace is elected by the people. While he usually does not receive a salary, he does in lieu of this receive fees. The Supreme Court has held, however, that such inferior judges may not be paid in criminal cases only from fines, at least unless the amount is very small. Otherwise, the court would always be under temptation to convict, and the defendant would be denied due process of law. Although he has lost much of his ancient prestige, the "squire" is still an important unit in our system of justice.

The Lowest Regular Court

Above the justice of the peace are the lowest courts of the regular judicial system. They consist of a single judge and bear different names in the different states. Sometimes the state is divided into districts in each of which there is a single court having jurisdiction over all types of cases, whether civil or criminal, law or equity.⁴ Other states have separate courts for different

² See p 424

⁸ See p 536

^{*}See pp 359, 360.

classes of cases. Such names as District Court, Circuit Court, County Court, Superior Court, or Court of Common Pleas may apply to courts with jurisdiction over civil cases alone or to courts with jurisdiction over both civil and criminal cases. In certain other states there are special criminal courts bearing such names as the Court of General Jail Delivery, or the Court of Oyer and Terminer, or the Court of Sessions In cities there may be a Municipal Court. In a few states there is a separate system of Courts of Equity or Courts of Chancery; in others the same court hears both equity and law cases; and in still others the distinction between equity and law jurisdiction has been abolished, so that the same court administers both at the same time. In some states there is a Probate Court, Surrogate Court, or Orphans' Court with jurisdiction over the probate of wills and administration of estates.

Especially in municipalities, other courts with specialized functions also have been established. Traffic courts have been set up to deal with violations of traffic laws. Juvenile courts with jurisdiction over youthful offenders and over children whose parents are dead, or whose parents, if living, are unable to provide adequate supervision, have increased in numbers in recent years. The latter in their improved form do not hear "cases" or impose penalties in the strict sense of the word. Instead, they investigate cases of delinquency, place the delinquent in a reform school, return him to his home under the supervision of a probation officer, or otherwise try to bring about improvement in the conduct of the youthful offender, without any idea of "punishment." Courts of Domestic Relations also have been set up to deal with problems of the family. They differ from Divorce Courts, which exist in some places, in that their chief end is to heal the causes of divorce and other domestic difficulties, holding the family together rather than separating it.

Despite all this perplexing variety of names and jurisdictions, however, the courts under discussion have certain elements in common. They are courts primarily of original jurisdiction, that is, courts in which cases are first brought to be tried, as distinguished from courts of appeals into which cases are carried for a correction of alleged mistakes in a lower court. In most states

the only appeals that reach them are those brought up from justices of the peace, or the minor courts that have supplanted the justices of the peace in some places. Since, however, cases coming from justices of the peace usually are tried entirely anew, they are not in the strict sense cases of appeal. In a few states some of the courts under discussion which have a broad jurisdiction hear appeals from minor ones among them which are limited to smaller cases. In general, however, these courts are almost entirely courts of original jurisdiction. They are the "trial" courts, or "courts of first instance," that is, the courts in which the evidence is heard in its entirety and a decision given, whereas the appeals courts above them have only such evidence before them as appears in the record of the lower court.

Intermediate Courts

Above the courts of original jurisdiction some states have set up intermediate courts, of which there may be one for the whole state or several in different districts. These intermediate courts consist of three or more judges. They have little original jurisdiction and are limited almost entirely to appeals from the lower courts. Their decisions are often final for certain classes of cases, thus relieving the highest court of a great deal of business. The jurisdiction of these courts varies much from state to state, a frequent provision being an upper limitation upon the amount of money which may be involved in an appealed case, thus taking the larger controversies directly to the highest court. The names of these courts varies. The term Court of Appeals is common, but Supreme Court, Superior Court, and other names are found in different states.

In states that have no system of intermediate courts, some of the courts of original jurisdiction may be given appeals from minor courts of original jurisdiction.

The Highest Court

Above the intermediate court or courts is the highest court of the state. It is always a single court of three or more judges rendering decisions by a majority vote. Usually it is known as the Supreme Court, but the name Court of Appeals or some other variation is used in a few states. Where the term Supreme Court is used for the intermediate court, another term, such as Court of Appeals or Court of Errors and Appeals, is used for the highest court.

Whatever its name, the highest court is limited almost entirely to appeals from the lower courts. As a court of appeals, the highest court hears no new evidence but depends entirely upon the record sent up by the lower court. Cases are carried to it from the intermediate courts or sometimes directly from the courts of original jurisdiction. Cases involving the interpretation of the state constitution or a federal question may always be appealed to this court. Sometimes other cases must involve more than a certain fixed sum. Where the intermediate court has been given final jurisdiction over a class of cases, there is, of course, no appeal

In a few states the highest court renders advisory opinions upon questions submitted to it by the governor, the council, the Senate, or the House of Representatives. The federal courts will not render advisory opinions, and it is the general rule that no state court will do so in the absence of a provision in the state constitution that requires it. The practice of giving advisory opinions has the advantage of making less likely the enactment of unconstitutional legislation.

The decisions and opinions of these courts are printed, so that they may be followed by lower courts. They become precedent for the highest court itself in subsequent cases.

From the highest court of the state having jurisdiction over a case an appeal lies to the Supreme Court of the United States in proper cases and according to rules laid down by Congress.⁷

Appeals from the decisions of the trial courts are based upon alleged mistakes in such courts. Ordinarily it is the loser in a controversy who appeals, although in such a case as one in which the plaintiff in a suit won the verdict but did not receive as much

⁵ See p 186.

⁶ See p 205.

⁷ See p 190.

damages as he believed himself entitled to, the winner might appeal. In a criminal case the state may not appeal, since this constitutes double jeopardy for the accused. If the accused loses the case, however, he may appeal. The historical distinction between "writs of error" and "appeals" in the narrow sense has been discussed, as has the writ of certiorari, which is not strictly an appeal but accomplishes much the same end.

Common Law and Equity

The law administered by the courts of the states is the common law of England as developed in the colonies up to the Revolution and as modified subsequently by constitutions and statutes. The term "common law" in general refers to the body of law that has developed upon the basis of custom and the decisions of courts, as distinguished from statutory laws, which are enacted by legislatures. In a narrower sense the term "common law" excludes both "equity" and "admiralty law." Usually "common law" is used in contradistinction to "equity." The state courts are not concerned with admiralty, which is left to the federal courts. "Equity" came about largely through the fact that the common law had developed into rather fixed forms and sometimes the following of these fixed rules led to results that were unfair or were socially undesirable. To remedy these defects in the common law a system of justice was developed, largely by the Chancellors in England, that was distinct from the common law, and which came to be known as "equity." Through various legal devices the Chancellors provided a system of justice that did much to obviate the injustices that resulted from the inflexible common law. In time equity itself came to acquire fixed forms.

Formerly equity was administered by a separate system of equity courts or "chancery courts" as they were frequently called. Only a few states now have separate equity courts. Others permit both law and equity cases to go to the same court. Still others have merged law and equity into a single system of justice which is applied to each case that comes up for determination.

^{*}See p 190.

Civil and Criminal Cases

All cases that reach the courts fall into two classes—civil and criminal. Civil cases may be described broadly as cases in which an attempt is being made to secure possession of property, or to enforce a payment, or to secure damages. Criminal cases are those in which the state is taking action to enforce a penalty for the violation of law.

Civil cases involve such questions as the title to land, breaches of contract, and torts. A breach of contract is a breach of a specific agreement with a person or persons. A tort is a breach of duty not based upon contract whereby someone has wrongfully committed an act, or failed to commit an act, so that another has been injured either personally or in reputation, or has otherwise suffered a loss. Under the common law all civil cases had to be brought under certain forms of action, such as assumpsit, replevin, trespass, or trover. Each of these had to be used under certain circumstances, and they were technical in nature. Some states are reducing the number of actions and removing much of the technicality surrounding their use.

Criminal cases are those brought by the state to enforce penalties for violation of the law. It is a fundamental principle of English law that an individual is presumed to be innocent until he is proved to be guilty. Many safeguards are set up to prevent an innocent person from being found guilty and any doubts are supposed to be resolved in favor of the accused person.

The Procedure in a Criminal Case

A common procedure in a criminal case is for a person who has been injured by a criminal act to swear out a complaint before a justice of the peace, who then issues a warrant ordering the arrest of the accused person and holds a preliminary hearing to determine whether there is a reasonable basis for the accusation. Ordinarily only the evidence against the accused person is heard. If this evidence is sufficient to justify further proceedings, the accused will ordinarily be placed on bail and bound over for the grand jury. Only in exceptional cases and for very serious crimes may bail be refused and the defendant held in jail. Bail con-

sists in the furnishing of a bond by the accused and another person or bonding company, who forfeit the amount of the bond in the event of the disappearance of the accused. In metropolitan centers there are bonding companies that make it a business to furnish bonds, charging a percentage of the amount of the bond for the service.

The procedure outlined up to this point need not be followed in all cases. For instance, sometimes an arrest may be made without the preliminaries of an accusation and a warrant. Ordinarily such arrests are permissible where crimes have been committed in the presence of an officer or where he has good grounds for believing that someone has committed a serious crime. Ordinary citizens also may make arrests at times, particularly for serious offenses committed in their presence, but their powers in this respect are not so broad as those of officers. Another variation from the above procedure occurs when the crime is a minor one and the justice of the peace has jurisdiction to try the case. In this instance, instead of holding a preliminary hearing, the justice actually tries the case, gives a verdict, and if the verdict is "guilty," imposes a penalty. It should be noted also that all of the above procedure, involving the participation of the justice of the peace, may be omitted, as will appear later.

After the accused has been bound over for court, the next step is the action of the grand jury. In most states an accusation by the grand jury is necessary for trial except in the case of minor offences. The grand jury at common law consisted of not less than twelve nor more than twenty-four men, with twelve necessary to bring an indictment. In practice, twenty-four are not now used, for with twelve sufficient for an indictment this would not be a majority. As a matter of fact, some states have fixed the number at less than twelve, and changed the number necessary for an indictment. Thus, some require nine out of twelve or five out of seven. One of the number is known as the foreman.

The grand jury is one of the most ancient of English legal institutions. Usually it is chosen from a list of taxpayers by the process of drawing names by chance. The process is under the supervision of the judge of the court for which the jury is chosen,

a court officer, or a special jury commission. The duty of the grand jury is to pass upon charges, known as "indictments," against persons who are accused of having violated the law. The process leading to indictment may begin with a "presentment" brought by the grand jury itself on the basis of personal knowledge that members of the grand jury may have of violations of law, or may begin with the charges begun before a justice of the peace as outlined above, or may begin upon the initiative of the district attorney. In any case the district attorney draws up an indictment, which the grand jury approves as a "true bill" if it desires that the case go to trial. Only the witnesses against the accused are heard.

Indictment by grand jury is not necessary in all cases. Sometimes an "information" brought directly to the court by the district attorney is substituted for the indictment. Ordinarily approval by the judge of the court into which the information is brought is necessary before further action can be taken. The common law recognized this process as valid in cases other than felonies, but some states now permit it for felonies as well. This procedure does not constitute a denial of due process of law (Hurtado v. California).

After indictment, the accused is brought before the court, where he usually enters a plea of "not guilty," although he may plead "guilty" or enter certain other more unusual pleas. The plea of "not guilty" is followed by the trial.

At common law the trial or "petit" jury consists of twelve men, and their verdict must be unanimous. This common law principle is required by constitutional provision or by law in nearly all the states. In a few states a smaller number is used for the less serious offenses. In some states the accused may waive jury trial in the case of petty offenses, and two states permit the waiver of jury trial in felonies. Members of the petit and grand jury are selected from a panel of "veniremen" whose names are drawn by chance. The lawyers examine the prospective petit jurymen, each side being permitted to make a certain number of peremptory challenges and to make other challenges for cause. A peremptory challenge is one for which no reason

⁹ See p. 519.

need be given, and it removes that person from consideration. The number of peremptory challenges is fixed by law, and varies from half a dozen in civil cases, up to perhaps thirty in the more serious criminal cases. Challenges for cause may be based upon the fact that the individual is mentally incompetent, that his mind has been made up on the case, that he is not of age, or that he is otherwise unfit.

It is the function of the petit jury to pass upon the facts in the case. It does this in a criminal case by bringing in a verdict of "guilty" or "not guilty," upon each count, or charge of violation of law, in the indictment.

The case against the accused is prosecuted by the district attorney in the name of the state. In the course of an important criminal trial many objections are made by the opposing lawyers to the introduction of evidence or to questions put to witnesses. Since the rules upon these subjects are complicated, there are many occasions for objection. The judge rules upon these objections, and counsel, especially counsel for the defense, may take an exception. Since the defendant may appeal his case on the basis of an incorrect admission of evidence, the exceptions of the lawver for the defense may later become the basis for an appeal. After all examination of witnesses is over and counsel have summed up their cases, the judge gives his charge to the jury. This charge informs the jury of its duty, reviews the evidence, gives instruction upon the procedure of the jury in arriving at a decision, and informs them upon the law applicable to the case. The jury then passes upon the guilt or innocence of the accused, and if the verdict is "guilty," this is followed by the sentence of the judge, who fixes the penalty at his discretion within the limits set by the law. Where the jury "disagrees," that is, cannot arrive at a unanimous verdict, there must be a new trial.

Appeal may be made by the accused, but the state may not appeal, since this would constitute double jeopardy, which is forbidden by most state constitutions. There is no exact and uniform rule as to just what constitutes "jeopardy," but a mere indictment that has not gone to court does not constitute jeopardy, while actual trial does. If, however, the jury is unable to agree, a new trial does not constitute double jeopardy.

In a criminal trial the burden of proof is upon the state, and in addition many technicalities may be raised in favor of the accused. If the indictment has been improperly drawn, it becomes necessary to take the whole matter up again in the grand jury. The delay in securing a new indictment is to the advantage of the accused. Witnesses for the state may die or disappear, and in any event juries are loath to convict after a long period has elapsed. Mistakes of the judge in ruling upon points of law may become the basis for appeals and further delays.

The Procedure in a Civil Case

The trial of a civil case resembles in general outline the trial of a criminal case. It is not preceded, of course, by indictment and arrest. Instead, a summons is issued to the defendant, the plaintiff files an outline of his case with the court, and the defendant may reply. As in criminal cases, the jury passes upon the facts and the judge upon the law. Ordinarily the jury is the common law jury of twelve with a unanimous verdict, but some states permit a smaller number or less than a unanimous verdict. The parties may also be permitted to waive jury trial, leaving both facts and law to the court. No juries are used in equity cases, the judge passing upon both law and fact.

The Selection of Judges

The judges in the courts of the various states are chosen in several ways. In about three fourths of the states they are chosen by popular election. A few states provide for appointment of judges by the governor. A few others vest the choice in the legislature. In New Jersey, the Chancellor, or presiding judge of the highest equity court, appoints the other members of this court.

The election of judges by popular vote is based upon the idea that the people should control all branches of the government and upon the fear that appointed judges might be too much influenced by wealthy interests. Election is expected to secure judges with greater sympathy for the people. Since judges in this country have the power to hold acts of the legislature uncon-

stitutional, this "legislative" function possibly has had something to do with influencing the states to turn to popular election. Most students of the subject believe that popular election is an ineffective means of securing judges who are adequately informed upon the law and of the proper temperament to apply it impartially. This is especially true when candidates must be chosen in primaries. In some states the bar associations are active in securing desirable candidates for judgeships and in such states popular election is not subject to as severe condemnation as in states that leave the choice of candidates to the usual mechanics of politics. It is quite likely too that some good men are deterred from campaigning for judgeships, with the resultant danger of becoming the targets for political mudslingers, who might nevertheless accept appointment to the office. Election carries the further objection that it seldom results in promotion from a minor judgeship to a more important one. In some countries of Europe it is customary for men to train themselves for the bench, following a different course from those who are equipping themselves for the bar. Entering judicial office they look forward to promotion from the minor to the more important judgeships. In this country judgeships go to lawyers who have been trained primarily for the bar, and there is little idea of judgeship as a permanent profession with promotion from one office to another.

There appears to be no good reason for choice by the legislature except that the legislature may have more knowledge of the qualifications of candidates than would be possessed by the electorate. Appointment of judges of the lower courts by those of higher courts probably is better than choice by the legislature. Appointment by the governor, however, is the plan most likely to lead to a responsible selection and is more conducive than election to the application of the principle of promotion. Of course, even this does not guarantee the choice of nonpolitical judges, since men who have campaigned for the majority party are likely to be awarded with appointments. If the terms of judges could be lengthened to life tenure, probably the tendency to choose politicians would be reduced, since appointments would be rare and would not occur at such regular intervals as to encourage political activity among aspirants. With the building up of a

healthy attitude toward judicial office such political activity might be further reduced.

The Term of Office of Judges

The term of office of state judges usually is not over four or six years. A very few states in New England have retained life tenure for their judges, such as was customary in the first state constitutions. A few states have compromised with fixed, long terms, but most have adopted the idea of short terms. This, combined with popular election, involves the judicial office in politics. It does not enhance the dignity or independence of the courts. Probably the great esteem in which the federal judges are held is due in great part to their tenure and the method by which they are chosen for office. Perhaps the chief argument for the short term is the fact that it provides a method for getting rid of judges who are unfit and yet have committed no crime that would make them liable to impeachment. Unfortunately, it also encourages carelessness in the choice of judges.

The common method in the United States of removing judges before the expiration of their terms is the process of impeachment by the lower house and trial by the upper house. It is not intended to be a method of removal for incompetence, but is limited in its application to crimes.

The early state constitutions usually provided also for removal upon the joint address of the two houses of the legislature. Most constitutions required a two-thirds vote and some permitted a hearing to the judge under consideration. This method has been discarded in practice, although provisions for removal on legislative address still appear in some constitutions.

A few states have provided for the removal of judges through the "recall." ¹⁰ This method carries with it the danger of popular infringement of judicial independence, since it is possible that the recall may be resorted to without reference to the incompetence or unfitness of the judge. Through the recall a judge might be removed because of the unpopularity of a decision that was based upon legal points incomprehensible to the electorate.

¹⁰ See p. 339.

The plan has few advocates at the present time, although it does not appear to have been abused in the states that have adopted it.

The Quality of Judges

It is evident that the American states have not yet worked out a solution of the problem of choosing the best type of judges and of retaining and developing them as members of a career profes-The need for greater care in the selection of the judicial personnel arises not only from their judicial functions in applying the law and their legislative functions in passing upon the constitutionality of statutes but also from their important administrative duties. A very great amount of property from time to time comes under the administrative care of courts. The control of this property is carried out through receivers and administrators, but since these are the instruments of the courts that appoint them, the courts are the ultimate administrative authorities. Entire railroads and other important businesses may thus be controlled and administered by the courts. Integrity and sane judgment are put to a severe test in such cases. The important work of the courts should not be left to the vicissitudes of politics and the vagaries, and worse, of untrained and unprofessional minds.

The Bar

In addition to judges of high quality it is important that we have lawyers who are equally well prepared in their profession. As a member of the bar, the lawyer is an officer of the court and as such enjoys an official capacity. He may be called upon by the court to perform such duties as the defense of suits for indigent persons, and he is expected to cooperate with the court in maintaining its dignity and orderly procedure. He may be disbarred from practice if he is guilty of crime or unprofessional conduct.

In the early history of the country, preparation for the bar was accomplished by entering a practicing lawyer's office as assistant and reading Blackstone's *Commentaries* on the side. Bar examinations, if required, were extremely informal. Martin Van

Buren in his autobiography reports an account given by Thomas Jefferson of a young clerk in a country store who requested that Mr. Jefferson use his influence with Messrs. Wythe and Pendleton to join with Jefferson in granting a certificate of qualification which was needed in order to procure a license to practice law. The young man admitted that he had not yet opened a law book but promised that he would not begin practice before he had followed the proper course of study. Upon this promise the certificate was granted. The young storekeeper was Patrick Henry. Jefferson expressed doubt as to whether Henry ever read any book through. In one of his letters Jefferson says that when he came for his license, Henry, he believed, had read law not over six weeks. Perhaps in view of Henry's later success we may find in this account some justification for the earlier laxity, although if such admissions to the bar occurred with persons of less genius, we can sympathize with their clients. Albert J. Beveridge's biography, The Life of John Marshall, brings out the fact that the man who was later to become the great chief justice apparently attended lectures in law for about six weeks-and at that he appears to have been so thoroughly absorbed in contemplation of the charming Mary Ambler, whom he later married, that it is doubtful whether his professor retained his full attention.

Admission to the bar in most states now is based upon examination, accompanied by evidence of attendance for a fixed number of years in a law school. Good moral character, citizenship, and a certain period of residence usually are also required.

The body of law is so great and so technical in nature and the procedure of courts is so complicated that no layman without legal aid could prosecute his own case. The public is dependent upon the legal profession for an informed and conscientious presentation of the issues in litigation before the courts. High standards of training and professional conduct are needed for the bar, as they also are needed for the bench. It is generally conceded that we will need to make much improvement in this respect before the legal profession as a whole in the United States can rank with that of such countries as Great Britain.

The District Attorney

In the administration of the criminal law there is one public official upon whose uprightness, fairness, industry, and legal ability the whole problem of the enforcement of the criminal laws depends. This official is the district attorney, or the state's attorney, as he is sometimes called. Criminal cases are prosecuted in the name of the state. If the state does not take action to prosecute criminals, they will go unpunished. The district attorney is the representative of the state in the prosecution of these cases. He prepares the indictment for the grand jury, or prepares the "information" for the court that sometimes may take its place. While the grand jury may bring presentments without the initiative having been taken by the district attorney, as a matter of practice it is not likely to do so. At the very beginning of the case, therefore, the prosecution may be nipped in the bud through the simple failure of the district attorney to take action. He may do this through the belief that there is not sufficient evidence to sustain a case; he may be so busy that he is unable to investigate all violations of law with sufficient thoroughness; the court may have so many more important cases ahead of it that it is thought best not to add to the list; or perhaps the district attorney may be open to influences from criminal elements or from political forces that are allied with crime. Moreover, even after a grand jury has brought an indictment the district attorney may enter a nolle prosegui, which constitutes notice that he has abandoned the prosecution. After the case has begun, the prosecuting attorney may pursue it with vigor, or he may, through laxity, incompetence, or worse, so handle the prosecution as to leave the jury no alternative but a verdict of "not guilty." Even though an action of the district attorney may have been influenced by improper motives, his functions are of so delicate and discriminating a nature as to make it impossible for anyone to be certain of this.

In view of the great latitude of action left to the district attorney as to whether a prosecution shall or shall not be carried out, he exercises a kind of judicial function. He may even be con-

sulted by the judge upon the sentence to be imposed in the event that the defendant is found guilty. As the representative of the state he should maintain an impartial attitude of mind that is not called for in other counsel to the same degree.

In the collection of evidence the district attorney operates under great handicaps. His department is separate from that of the police, but he is very largely dependent upon the police in the preparation of his case. The nature of the charges being brought, the names of witnesses and the character of their testimony may be furnished in bare outline and too late for study before the case is carried to court. The district attorney cannot carry on an equal combat with highly paid and skilful defense attorneys who have studied every angle of the cases of their wealthy criminal clients unless he has an adequate force of assistants and the complete cooperation of the police.

Practically everywhere the district attorney is an elected official, serving for a short term, and too much involved in politics to find it easy to maintain the judicial attitude necessary to a proper performance of his office. The short term and its political nature preclude development of the office into a career, as is the case in many other countries.

The Sheriff

Within each county and attached to its court is the sheriff. The office of sheriff originated under the Anglo-Saxons. He was the reeve of the shire and represented the interests of the king. Among his many duties was the maintenance of order. While the sheriff has lost most of his ancient dignity, he still performs duties that are vestiges of his older character, for the sheriff is the peace officer of the county. In addition to his police duty in the maintenance of order, he carries out the orders of the court, serving warrants, summoning jurors, bringing in prisoners for trial, superintending the care of the local jail, and conducting public auctions. In all the states except Rhode Island the sheriff is an elected official.

The Constable

The constable in America may be an officer subordinate to the sheriff or he may be an independent official attached to a minor court such as that of the justice of the peace. In the latter case his duties are similar to the duties of the sheriff, within a more limited sphere.

The Coroner

Another official having important functions in the administration of justice is the coroner. Like the sheriff he has a long history, but probably the office is not so ancient or so dignified as that of sheriff and has declined more rapidly. Formerly a representative of the crown in important matters, substituting at times for the sheriff, and performing some judicial functions, he still shows something of his former nature as a representative of the king, for his chief present function is to determine whether the peace has been violated in connection with violent deaths. He may, if he considers it desirable, summon a jury which has power to bring charges against anyone it holds guilty in connection with the death under investigation. Such charges do not take the place of indictments but may become the basis for subsequent grand jury action. A coroner should be a physician and should be capable of performing autopsies. He should be a lawyer with a specialized knowledge of medical jurisprudence. In addition, he should have the skill in eliciting information and in weighing evidence that is associated with judicial office. Thus the coroner should have qualifications that few coroners actually possess. Usually the office is elective and this method of choice is a poor one for selecting officials requiring technical qualifications. Usually he is a local doctor, not especially trained for this work. Massachusetts and New York have divided the duties of the coroner among a medical examiner, who performs autopsies and presents evidence bearing upon the manner of death, a magistrate, who conducts the judicial investigation or inquest, and the prosecuting attorney, who examines the witnesses and hears the testimony.

Small Claims

The American system of justice has been the subject of much criticism in recent years. Its delays, its expense, its archaic technicalities in procedure, its lack of unity in organization, have all come under fire. At the same time some efforts at improvement are being made in various directions.

The settlement of small claims cases by litigation in the courts is a cumbersome and expensive process. Attorneys fees are necessarily so high as to make such litigation very unprofitable. Yet many such cases are simple in nature. They involve no questions that cannot easily be determined by the judge after a study of the facts as presented by the litigants without the aid of counsel. Yet, while the amounts involved are small, they may loom up large to wage earners and other persons of small means. A number of states and cities have set up small claims courts or have substituted a summary procedure for the determination of small claims in their existing courts. The maximum amounts in controversy may be \$35, or \$200, or even \$1,500. The procedure involves a determination of the suits by a judge, usually without the aid of lawyers or juries. It is extremely simple. In these courts three or four cases can be settled in an hour. The costs of the court are kept low, amounting to perhaps fifty cents or a dollar.

Conciliation

Closely allied in purpose and even in method to the small claims court is the machinery provided in some states for the conciliation or arbitration of disputes. Conciliation could, of course, take place between the parties without the aid of special court assistance, but, as a matter of fact, persons who are contemplating a lawsuit are not usually in the proper frame of mind to plan anything out of the usual in the way of settling their dispute.

A number of cities have provided plans of conciliation, and the state of North Dakota has had a system in operation for a number of years. Conciliation is a method by which disputes, usually limited to small sums, may be adjusted by the parties involved, in the presence of a person appointed by the court or in the presence of the judge himself. Conciliation implies that there is no compulsion to reach an agreement, although there may be a provision of law to the effect that no lawsuit for a sum less than some fixed amount, as \$100, may be initiated until an

effort at conciliation has been made. The latter feature is found in the very successful conciliation systems of Denmark and Norway, where all cases must go to a court of conciliation before going to law. Conciliation saves expense to the parties involved, is more informal and expeditious than a lawsuit, relieves the pressure on the courts, and tends to allay hard feelings between neighbors. Since the procedure is more flexible than that of a lawsuit, conciliation more easily leads to compromise in cases in which all the right is not on one side.

Arbitration

Arbitration differs from conciliation in respect to the power of the representative of the court. The conciliator may strive only to bring the parties to an agreement. The arbitrator has been authorized in advance by the parties to decide the controversy, and his decision is given the same force and validity as a formal court decision. Arbitration has been particularly successful in Great Britain, where its chief use is in connection with commercial disputes. There, the trade associations of business men require that their members provide in their contracts for arbitration of disputes. Business men, themselves more familiar with business terms and practices than the courts, serve as arbitrators, and there may even be provision for appeal to a higher, permanent board of arbitrators. In general these controversies hinge upon questions of fact, but there is provision for appeal to the courts on points of law. The plan gives inexpensive and expeditious iustice, and the decisions are made by men more familiar with the technical aspects of the controversies than are the judges in the courts. All of this is authorized by law and the decisions have the same validity as decisions of the courts.

Provisions for arbitration are found in many American states. The idea has not secured the hold in this country that it has in England, however, partly because compulsory provisions are not so customary among trade associations and partly because many of the state laws have been faulty in their technical provisions. The federal government has provided for arbitration of disputes involving maritime matters and interstate commerce. Most of

the American laws provide only for the submission to arbitration of controversies after they have arisen, but the federal law and the laws of some states provide for the insertion in contracts of provisions for the arbitration of future disputes.

The Declaratory Judgment

Small claims courts attempt to settle minor civil cases by a simple, expeditious and inexpensive process. Conciliation and arbitration accomplish the same end without recourse to a court procedure. Somewhat allied to these is the "declaratory judgment," which is a means of clearing up doubtful legal problems in a court, but without the need of a court order. The development of law has been such that ordinarily it is impossible to secure a judicial determination of a doubtful legal point without first taking some kind of action and then waiting to be brought into court by an injured party. Suppose, for instance, that a contract between two business men contains a doubtful point. The procedure at common law is not to take this to a court immediately and have it cleared. The only way to secure a court interpretation 1s for one of the business men to take some action according to his interpretation of the contract. This may take the form of simply failing to make a payment which the other party to the contract believes is due. Then the injured party can take his case to court and attempt to secure an order for the payment The court will then determine whether the first business man has broken the contract or not, and if he has, order payment to be made. In other words, we cannot find out what the law is without doing something or failing to do something, thus providing the basis for a suit. It is often said that the way to find out what the law is, is to break it. The declaratory judgment is a means of finding out what the law is, at least in certain classes of problems, without the necessity of first taking some action that may invade the legal rights of another person. It has been in operation successfully in England for many years.

The British act reads: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

Under this act, a dispute over a boundary line between two neighbors need not be settled by the building of a fence by one of the disputants, to be followed by a suit for damages by the other. The problem can be settled without building the fence.

The declaratory judgment cannot be given merely at the request of one party without the usual process of securing the attendance of all the parties that would be necessary according to the ordinary court procedure. The suit must constitute a "case" or "controversy." It differs from the usual suit in only one important respect—the court merely determines rights in the case without the necessity of a court order. The United States and about thirty states have declaratory judgment statutes. The constitutionality of a state declaratory judgment law has been upheld by the Supreme Court of the United States (Nashville, Chattanooga & St. Louis Railway Co. v. Wallace).

The Advisory Opinion

Differing basically from the declaratory judgment is the "advisory opinion." Some state constitutions permit the highest court of the state, upon the application of the governor or the state legislature, to give opinions upon important legal questions. This makes it possible to secure an opinion from the highest state judicial body upon the constitutionality of a proposed law before it has been enacted. Ordinarily we must wait for a law to be passed and a case to arise before hearing from the courts upon its constitutionality. The act may stay on the statute books for years before being contested. Then someone refuses to abide by the law, a case is carried through the courts, and it is discovered that the act is invalid. The advisory opinion makes this less likely. It should be noted, however, that the court can give only an "opinion." No "case," no "controversy," between two parties is presented. Moreover, the court does not have the advantage of hearing the arguments of counsel of interested parties on both sides of the problem. An advisory opinion would not have the value as precedent of a true "case." A declaratory judgment is given only in an actual controversy, with all parties properly notified, and after hearing the arguments of counsel, whereas the advisory opinion lacks all these elements. The giving of advisory opinions is ordinarily held not to be a proper function of a court unless called for by the state constitution.

The Cost of Justice

A problem that is receiving increasing attention is that of relieving the poor from the expense attendant upon the defense of their rights in court. A lawsuit involves the payment of certain fees, such as fees for writs, and other costs, such as fees to witnesses and stenographers' charges. In addition, there is the attorney's fee. Various states make provision for the relief of persons unable to pay some or all of the court expenses. Few people are willing to take the required pauper's oath, however, and little relief is afforded by such provisions.

Attorney's fees constitute an even heavier burden. Relief by the state in respect to this important item has been restricted almost entirely to criminal cases. In every state there is provision for the assignment of counsel, without cost, to poor defendants, at least in cases of felonies. In cases involving capital punishment there is frequently some provision for payment of counsel. The system has not been satisfactory. The counsel assigned are not often the most able and experienced members of the bar, since such men prefer to practice for clients who can pay well. In some places there are lawyers who deliberately place themselves in the way of being appointed to such cases, since they have developed a technique for extracting funds from accused persons and their relatives.

A few cities have established the office of public defender. This system gives to poor people a greater assurance of able counsel, provides adequate compensation, and is economical as compared with any system of assigned counsel in which there is provision for proper compensation. With few exceptions the public defender is limited to criminal cases.

Assistance given to the poor in civil cases has been limited almost entirely to the free service that some lawyers are willing to

give to poor people who arouse their sympathy, and to private "legal aid" bureaus that have been organized in some cities. Legal aid bureaus charge a nominal fee of a dollar or less and perhaps ten per cent of any amounts that are actually collected by them for clients, or may charge nothing at all Cases handled by these bureaus usually involve only small sums. Probably much of the need for such private agencies would be eliminated by the establishment of small claims courts, and provisions for arbitration and conciliation.

Court Administration

American state courts have been subject to criticism from many points of view. On the administrative side, fault is found with their inflexible organization and the lack of adequate provision for specialization. No matter how great the pressure of work in one court as compared with others, there is no way by which the overworked judge can be relieved by another who is not so heavily burdened. Moreover, when the court consists of only one judge he hears many varieties of cases that might better be tried by judges who are specialists in one class of cases. A proposed reform that would accomplish improvement in these respects is the unification for administrative purposes of the whole court system of a state into a single system, with power residing in the chief justice, or in the highest court, or in a council of judges, to assign judges from one court to another and to assign particular classes of cases to judges who are specialists in that class of case. It is argued that other improvements of a more technical nature, reducing the dangers of conflict of jurisdiction between different courts, and simplifying the process of appeal, would arise from a unified system of this sort. A movement in the direction of unified court systems appears in the judicial councils that have been set up in various states. These councils, variously constituted from among the state judges, usually have no powers except in the way of proposing improvements. The Judicial Council in the federal system has been a valuable innovation.11

¹¹ See p. 189

The Reform of Procedure

Another major criticism of our courts applies to their procedure. While England, from which country we brought the basis for our system, has simplified its procedure greatly, we retain technicalities and complications that surround justice with much mystery but which, according to its critics, accomplish little except to delay and even to pervert the true purpose of the courts. Our complicated "pleadings" and the mass of statutory provisions that attempt to prescribe exactly what is to be done in every contingency, have grown into a system that, compared with the British procedure, seems to obscure essential justice.

One reason for the great detail with which we attempt to specify procedure is the fact that in our state courts the judge has been reduced to a position of small importance during the trial, except to decide upon differences between opposing counsel concerning procedure. He has become little more than a referee. On the other hand, the English judge is primarily responsible for the choice of the jury and during the trial takes an active part in the questioning of witnesses. Moreover, when all the evidence is in he does not limit himself to the cautious summary of an American judge, but comments upon the evidence, and generally aids the jury with his expert advice in arriving at its verdict. The American judge is narrowly circumscribed upon what he may say to the jury. If he makes a mistake, it may become the basis for an appeal. Therefore, he is likely to make his remarks most general in nature and of little value to the jury. The British system recognizes the judge as the leader in the trial and aims to arrive at justice by a direct route. The American system tends more to convert justice into a combat between counsel, leaving the advantage to the litigant whose means enables him to employ the abler staff of lawyers.

A further difference between the English and American systems lies in the opportunities for appeal and retrials. In England, the process of appeal is simple; the appellate court may hear new evidence if it desires; and its action in effect constitutes a new trial which usually ends the case. In America, the appellate court may have to order a retrial in the lower court,

there may be more appeals, and for petty mistakes in procedure or other cause the case may be carried through a series of appeals to higher courts. The wealthy litigant again has the advantage, for he may prolong the process and wear out his poorer opponent until the latter exhausts his resources or quits in disgust. So long as we do not trust our courts probably we will retain the easy appeal on the theory that several courts are better than one, but a more satisfactory plan would be to improve the methods of our courts of first instance so as to secure a more certain application of justice in the beginning, rather than to continue upon the theory that two bad hearings are better than one good trial.

The Jury

Another criticism of our system centers around the petit jury. This body, consisting of laymen, often ignorant, usually unskilled in the weighing of evidence, sometimes even professional jurymen who put themselves in the way of being selected, passes upon the facts in the case. Peremptory challenges and challenges for cause may eliminate the better element in the panel of jurymen. Yet there is much to be said in favor of the retention of this lay element in our system of justice in lieu of leaving to professional judges the decision upon the facts. Perhaps the solution lies in the retention of the jury system, restricting its use so as to exclude the less important cases, and providing a system for choosing better men. In some cases, such as those involving certain types of commercial questions, men qualified to understand the technical practices involved should be chosen. Finally, if the presiding judge were given the powers of the English judge, permitting unrestricted comment on the law and evidence, the advantages of the lay element might be combined with the training, experience, and trained judgment of a professional judge.

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CHAPTER XIX

State Taxation

The Power to Tax

The power to tax is one of the inherent powers of a state. Since the state has certain functions to perform, it may be presumed to have power to raise funds to accomplish them. In exercising this power the state is limited by certain provisions of the federal Constitution. State constitutions customarily contain other limitations, which are placed upon the legislature in the exercise of its taxing power.

Limitations in the Federal Constitution

The federal Constitution carries in Article I, Section 10, some limitations upon state powers of taxation. States may not, without the consent of Congress, levy taxes upon either exports or imports, except such as are absolutely necessary for executing inspection laws. Even then, such laws are subject to revision by Congress, and the "net produce" must be turned over to the federal Treasury. Tonnage duties also are prohibited to the states. The evident purpose of these provisions was to safeguard interstate and foreign commerce from state taxation. The same section prohibits state laws impairing the obligation of contracts. One of the effects of this provision is to restrict the power of a state to tax private corporations created by itself, where the charters of such corporations carry exemption from taxation. The "comity clause," providing that citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, prevents the taxation of property of citizens of other states at higher rates than that of citizens of that state. However, corporations are not citizens within the meaning of this clause, and "foreign" corporations may be required to pay high entrance fees to do business in the state.1

A much more important limitation upon the taxing power appears in the Fourteenth Amendment, prohibiting a state from depriving any person of life, liberty, or property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws. A state may not take property from one person and give it to another under the guise of taxation. It is not necessary that every class of property be taxed alike, but the classifications into which property is put must be based upon reason and must not be arbitrary. The application of a tax in a particular case need not necessarily go through a judicial process, but the taxed person must have opportunity for a hearing in which he may state his case.2

In addition to these specific prohibitions there are a number of limitations implied from the federal Constitution. Goods in transit in interstate commerce are not subject to state taxation. If such goods have come to rest, however, they are subject to a reasonable, nondiscriminatory tax.3 Bonds and other instrumentalities of the federal government are not subject to state taxes. The salaries of federal officials are exempt under this principle, and the same is true of public property of the federal government.4

Another limitation upon the state taxing power arises from the rule that a tax to be valid must be for a public purpose. State laws violating this principle have been held to be in violation of the federal Constitution. Such cases fall under the prohibition of the due process clause of the Fourteenth Amendment. However, in a leading case, Loan Association v. Topeka, the Supreme Court did not rely upon that amendment, but apparently based its decision upon an abstract principle of justice, that property may not be taken arbitrarily from one and given to another. If this case were being decided now, no doubt the decision would be based upon the due process clause rather than natural justice.⁵

¹ See pp 302, 388 ² See pp 533, 538. ³ See p 568

⁴ See pp. 227, 256.

⁵ See p 533.

Jurisdiction Necessary

A state may tax only property that is within its jurisdiction. Just what constitutes property within its jurisdiction may be a question. Real property, that is, land and buildings and the like, permanently attached to the land, is taxable if physically within the boundaries of the state, regardless of where the owner may reside. The same rule now applies to tangible personal property, such as personal effects, jewelry, and other such movable property. Intangible personal property, that is, such things as stocks, bonds, and notes, valuable only because of what they represent in the way of ownership or obligation, is taxable at the residence of the owner. What constitutes his residence may become a question for determination. However, intangible personal property owned by a nonresident may be taxed by the state in which it is being used in business.

Limitations in State Constitutions

State constitutions also contain various types of limitation upon the power of the legislature in taxation. Many of these limitations simply duplicate the limitations of the federal constitution. In many states it is required that taxes be uniform, and this requirement of uniformity is sometimes so strictly interpreted by the courts that it is held to mean that all forms of property, real and personal, tangible and intangible, must be taxed at the same rate. Under such strict interpretations, graduated income taxes are unconstitutional. Some state constitutions specifically exempt the property of educational and charitable organizations.

Another type of limitation common in state constitutions is a limit upon the rate of taxation. This may take the form of a limit upon the total tax rate, that is, the aggregate of all state and local taxes, or it may be merely a limit upon the local tax rate. Often, however, such limits may be exceeded if supported by a vote of the electorate, a larger vote than a simple majority sometimes being required. Similar maximum limits often are placed upon state borrowing.

⁶ See p. 465.

The General Property Tax

The chief source of state revenue formerly was the general property tax, that is, the tax on real and personal property. Since most wealth was in the form of real or tangible personal property, these became the chief sources of revenue. For purposes of taxation, real property has the advantage of not being subject to concealment. The chief difficulty in taxing real property lies in determining its value. Unlike stocks, which have a uniform national value quoted from hour to hour on the stock exchange, real property values are not easily determined. Each plot of ground and each building has advantages and disadvantages distinct from all others. Moreover, sales, particularly of farm property, are slow and dependent in each case upon individual circumstances. The assessment of real property values is made in the first instance by local assessors who usually are elected officials. Appeals may be taken to a local board. Unfortunately, local officials seem to have a tendency to place a generally low value upon all property, and each locality, therefore, seems to be in competition with the others to maintain a low valuation. The election of assessors may have something to do with this. State boards of review, therefore, have been set up in many states to maintain a uniform valuation between localities as well as to take appeals in individual cases.

The personal property tax falls upon two classes of property, tangibles and intangibles. It is one of the most commonly evaded of all taxes and yields only a small portion of the amount it should. Tangibles are subject both to concealment and undervaluation. It would be impracticable to send assessors into every home searching for jewelry, clothing, and other movables that have not been declared. The yield of the tax would not pay the cost of administration. A similar difficulty would arise if assessors should attempt to dispute the valuations placed upon the articles that have been declared. Intangibles, stocks, bonds, notes and the like, are equally subject to concealment, although evaluation is much simpler, since the prices of standard stocks and bonds appear daily in the newspapers. For both tangibles and intangibles it is customary to rely upon sworn statements of

the taxpayers. Collections are increased in many states by levying a lower rate upon personal than upon real property. The temptation to concealment is thus reduced. In other states, however, this is not possible, since constitutional restrictions prevent a different rate of taxation upon different forms of property. Thus, the rate is kept high even though the total return is reduced. One form of personal property, automobiles, does not so easily escape, for the issuance of license tags may be withheld until the tax is paid, and quoted standard prices for the different makes and years may be made the prima facie valuation.

In determining values for the general property tax, the actual sale price of the property ordinarily governs. However, where the property is part of a going concern, it may be given a valuation equivalent to the valuation of the company on the basis of its gross receipts or upon some other reasonable basis. This is its value as a "unit of use," that is, its value as a going concern.

In general, evasion of the personal property tax has been so common as to bring the whole general property tax into bad odor. Persons who are too honest, or too timid, to engage in evasion are resentful toward a tax which others in like circumstances do not pay. This resentment exists particularly in states in which constitutional provisions prohibit a lower tax on personalty. Evasion of the personal tax throws a greater burden of taxation upon real property which cannot be concealed. This, in turn, produces another form of injustice, for a large part of the real property of the country is in the form of homesteads. Thus, the owners of farms and city homes find themselves burdened with an unjust share of the tax burden for the simple reason that their property is easily found by the taxing authorities. A few states in recent years have exempted from taxation homesteads up to a certain value. All these considerations have led to the application of new types of taxes which have so grown in volume that the general property tax is being supplanted as the principal source of state revenues. In fact, at the present time, the general property tax appears to be in the process of abandonment as a source of revenue for the central state governments and is being left to the local areas as a source of revenue.

⁷ See p 576.

The Income Tax

An income tax is levied by about two thirds of the states. Ordinarily it is applied both to natural persons and to corporations and is graduated so as to fall with increasing heaviness in proportion to the size of the income. In some states the graduated feature is held to be unconstitutional as a violation of the rule of uniformity. Small incomes are exempted, and thus the larger part of the people do not pay income taxes.

The income tax is looked upon with favor because, presumably, it falls upon that part of the population most able to bear it. It has been argued, however, that there would be an advantage in applying this tax to all incomes, however small, but made so light as to be little more than nominal in the lower income brackets Although the expense of collection from small incomes would be relatively heavy, the advantage would lie in focusing the attention of every person upon the tax. Supposedly the voters might then insist upon the most economical spending of their money, in contrast to the indifferent attitude of the man who realizes that after all it is other people's money that his representatives are spending. In the early history of the country the electorate consisted of taxpayers. It is still true that all members of the electorate do in fact contribute to the support of government. However, when the individual does not pay real, personal, or income taxes, his contributions are either entirely indirect or somewhat disguised through the fact that they are part of the prices paid for articles bought by him, or are paid in such small driblets that the taxpayer is not conscious of the total amount paid in.

Death Dutres

Estate taxes or inheritance taxes are levied in nearly all the states, and some states collect both. The right to bequeath property and the right to inherit property are privileges that exist only because the state permits them. Since they are privileges granted by the state, a tax may be levied upon their exercise. An estate tax is an excise upon the privilege of bequeathing property. An inheritance tax is an excise upon the privilege

of inheriting property. The estate tax is applied to the estate as a whole before it has been divided among the heirs. It may be graduated according to the size of the estate. The inheritance tax is applied to the amount inherited by each heir. It may be graduated according to the amount inherited by each individual and in addition may be graduated according to the degree of relationship of the heir to the deceased, increasing as the relationship becomes more distant. Of course, in states where the strict rule of uniformity is applied, neither estate nor inheritance taxes may be graduated. It should be noted that the courts regard these death duties as excises upon the privilege of bequeathing or inheriting, not as taxes upon the property, even though the amount of the tax in each case is governed by the value of the property.⁸

The influence of the federal government has been strong in relation to state death duties. Previous to 1926, certain states having no such taxes were publicizing the fact in order to induce persons from other states having such taxes to transfer their residence and thus protect their property from death duties. However, in 1926, the federal government levied a federal estate tax, and then permitted a deduction of eighty per cent of this to be applied to estate and inheritance taxes in the states. The state, therefore, must either collect the tax or allow the funds to go to the federal government. As a result, nearly every state collects death duties at least to the extent of eighty per cent of the federal tax of 1926. Subsequent acts have increased the amount of the federal estate tax, but credit toward state taxes has not been extended to the increased amounts.

Death duties are generally regarded as an excellent form of tax, since the amounts subject to taxation are fairly easily ascertained, they may be made to fall heaviest upon the rich, who can best afford to pay, and their effect is to tax persons who in most part have done nothing to build up the estates that pay the tax. Death duties also appeal to those who believe in a redistribution of wealth or in a greater equalization of opportunity, as a convenient means of bringing about these ends.

⁸ See pp 226, 541.

Excises and License Fees

The states also levy certain excises upon luxuries, such as tobacco, liquor, public amusements, and racing bets.

In addition, there is a system of state license fees. Usually, there are heavy license fees for the sale of liquor and for horse racing, where either of these is permitted. At relatively lower rates are license fees for the conduct of nearly all forms of business enterprise and the practice of many professions. In the aggregate, these fees amount to considerable sums.

Franchises are a special form of license for the privilege of doing something that involves special concessions. For instance, a street railway may need a franchise for the use of the public streets and for the monopoly inherent in such privileges, and a high charge may be made for this. Sometimes an "entrance fee" is charged for the privilege granted by a state to a corporation from another state to do intrastate business within its borders, but, once admitted, a corporation must be treated on a parity with domestic corporations. No charge may be made for the privilege of carrying on interstate commerce within the state.9

Automobile Taxes

The automobile has opened new sources of taxation. Not only may the general property tax be applied upon the car itself, but a license may be required of the driver, another license may be required for the privilege of operating it upon the public roads, and a tax may be levied upon the gasoline used in its operation. The two latter forms of tax are prolific sources of revenue. Automobile taxes are justified as necessary for the upkeep of the roads. When applied for this purpose, they approach the status of charges for the use of the roads.

The Sales Tax

Subsequent to the growth of the various forms of tax that have come with the automobile, the most striking recent development in our tax system has been the sales tax. Originating as a spe-

⁹ See p 627.

¹⁰ See pp 738, 740

cial, and presumably temporary, means of meeting deficiencies in the depression period, the sales tax seems to be here to stay. In its simplest form it consists in the levy of a percentage of the price of tangible personal property sold at retail. It may, however, be made to cover all sales, so that several such taxes would be paid on each article, as, for instance, when sold by the manufacturer to the wholesaler, by him to the retailer, and by him to the consumer. In broader form it may cover, in addition, charges for services rendered, as, for instance, the fees for professional men, or may be extended to cover other types of income. The sales tax is a convenient source of state revenue. The cost of collection is borne partly by the merchant, who collects from the buyer and reports his sales to the state. The levy upon each transaction is small and the individual does not feel at any one time the full force of the taxes he pays. On the other hand, the sales tax falls heaviest upon the poor. It reverses the principle that taxation should be in proportion to ability to pay, and it falls with greatest severity upon those necessities that constitute the whole expenditure of persons of meager income.

Other Sources of Income

Other sources of state income include taxes upon the capital stock of corporations organized under the laws of the state and poll or capitation taxes at the rate of one or two dollars per person. The poll tax, however, is not always strictly enforced. Fees for various services and fines imposed in the courts are sources of considerable revenue and sales of public property may at times bring in funds.

The depression greatly increased another source of state revenue, that is, grants from the federal government. Emergency funds for relief, for aid to agriculture, and for the construction of various projects were poured into the states. Whether granted to the states for expenditure by them, or actually spent by the federal government for relief projects within the states, the effect has been to relieve the states from the burden of caring for the suffering of their own people. Thus, even when not technically state income, such funds are matters which directly affect the finances of state governments.

Collection Machinery

The machinery of collection for the various state taxes is not centered in a single body. Certain taxes, such as the general property tax, are primarily in the hands of local assessors and local collectors, usually elected officials Disputes upon assessments may be subject to appeal to local boards and eventually to a state board. For the collection of sales taxes, income taxes, and other state taxes there may be a state tax commission. Various state officers may be charged with the collection of certain specific taxes, or there may be special commissions for the collection of certain taxes, such as the tax on automobiles. Regulatory bodies, such as railroad commissions, may be charged with the collection of taxes upon the companies subject to their juris-There has been a tendency as each new type of tax has been imposed to devise new means for its collection. State administrative machinery for collecting taxes is decentralized and often loses effectiveness for this reason.

Conflicting Taxes

A state may tax only such things as are within its jurisdiction. Unfortunately, it is not always easy to determine whether a subject of taxation is within the jurisdiction of the state. Moreover, the same thing may be within the jurisdiction of one state from one aspect and within the jurisdiction of another state from another aspect. In this case, both states may collect a tax. For instance, if a corporation is organized under the laws of a state, it becomes subject to the income tax of that state. It is a resident of that state for the purpose of taxation. At the same time, it may derive its income mainly from business in other states, and each of these states may tax the corporation for the privilege of doing intrastate business and may base the tax on the income derived from such business within that state. In addition, when this income is distributed to shareholders, it may be taxed as their personal income in the states of their residence. Likewise, a corporation may pay a tax on its capital stock to the state in which it is incorporated, and the shares of stock, held by individuals residing in other states, may be taxed as personal property in those states Land may be taxed in one state at its full value, and a mortgage upon it held by a nonresident may be taxed in the state of his residence. Instances of multiple taxation of this nature are by no means rare.

Moreover, the federal government also may levy a tax upon the same subject which one or more states are taxing. Thus, its income and estate taxes cover essentially the same subjects as similar state taxes, and the federal gasoline, tobacco, alcoholic beverage, and amusement taxes tap important sources relied upon by the states for revenue. The aggregate of our state and federal tax systems involves many inequities, and with more than one governmental unit acting upon the same subjects, proper planning and distribution of taxes is made difficult. Much of this confusion could be avoided if the federal government would limit itself to certain types of tax, such as tariffs, income taxes, and some others not within state jurisdiction or necessary to the federal government for regulatory purposes. The remaining fields might be left to the states, and if then some agreement could be reached upon principles for avoiding duplicate state taxes, an orderly taxing system might be developed.

Duplication in Machinery of Taxation

If, however, the state and federal governments must lay a tax upon the same subjects, it would seem to be unnecessary for each to maintain a separate administrative organization for the purpose, acting upon separate returns from each individual. This appears to be particularly true in the case of the income tax. States do not have the facilities of the federal government for checking the statements of taxpayers with the sources of income, which may be in other states. If the tax were collected by the federal government and the proper amounts allotted between it and each state, administration should be both more effective and less expensive. To some extent, this is the procedure under the federal estate tax, which permits a refund to the state of eighty per cent of the 1926 tax. The remaining twenty per cent, plus certain increases since laid, remain with the federal government. This procedure has the defect of being in effect

compulsory upon the states, but it points the way to other plans of a voluntary nature. The existing confusion and waste is too high a price to pay for local autonomy when no basic principle of states' rights is involved. A decent regard by each state for the common problems of all the states need not involve a sacrifice of final powers, and an effective system of assessment and collection need not involve the surrender by any state of the ultimate determination of what its taxes are to be.

State Debts

State debts are not now a serious problem. In our early history debts were piled up for "internal improvements" without proper regard for means of repayment, and in the present century some states indulged too heavily in expenditures for roads. The lessons learned from early extravagance have led to devices for preventing its recurrence. Most of the states have debt limits in their constitutions, either in the form of a fixed amount or a percentage of the value of the property subject to taxation. Some of them permit the limit to be exceeded by authorization of a popular vote. Often the constitution requires that at the time a loan is contracted taxes be levied to pay it off. Fixed limits upon state debts are by no means an ideal method of controlling finances, for the best financing may call for greater flexibility. In matters of government, however, the second best plan often is more practicable than the ideal one. At any rate, the present debt limits have greatly improved the credit of the states.

It should be noted that the credit of a state is not dependent upon its own debt alone. If the cities and counties are permitted to pile up loans, these debts must be met by taxation. The same taxpayers who ultimately must pay off local debts must be relied upon by the state to pay the state debt. It is the ability of the taxpayers to meet all these obligations that determines the credit of the state. This is one reason for the various debt limitations, similar to those laid upon the states themselves, that have been placed upon cities and counties. The most complete recognition of this unity of state and local interests appears in North Carolina, where most of the administration and financing of roads¹¹

¹¹ See p. 741

and schools¹² has been transferred from the county to the state, and a central body with powers of control over county finances has been set up. The reform of county government through authorization of the managerial system, has contributed to the same end.

The Treasurer

After the state taxes have been collected, they usually go to the treasurer who places them on deposit in banks. Past abuses in the selection of banks of deposit have led to various restrictive regulations, setting up boards for the choice of banks, and placing limitations upon the type of depository.¹⁴

The Budget System

Important in maintaining a proper organization of state finances are an effective budgetary system and a proper system of audit and accounting. These are discussed under the functions of the governor¹⁵ and the auditor.¹⁶ The principles applicable to the states in these respects are not different from those applicable to the federal government.¹⁷

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¹² See p 733.

¹³ See p 425.

¹⁴ See p 347.

¹⁵ See D 242

¹⁶ See p 348

¹⁷ See p 243.

CHAPTER XX

Cities

Characteristics of Cities

A marked characteristic of modern civilization is the number and size of its cities. These urban areas give rise to special governmental problems. It is not merely that the population of a city is greater than that of a rural area of similar extent, but that the city presents a distinct complex. Its governmental problem is different not only in degree but in kind.

City populations historically have been more volatile, more inclined to sudden changes of feeling, than rural populations. Education usually is on a higher level and more diffused. The people usually are more heterogenous. Cities attract people of many races. Occupations are of infinite variety as compared with those of rural regions, where industry is limited to agriculture and its related trades. The city produces great extremes of wealth, ranging from millionaires' row down to densely packed slums with teeming populations living barely on a subsistence The struggle for a livelihood is more intense than in rural communities. The prizes of fortune are greater and the penalties of failure are harder, for starvation walks very closely behind the man whose weekly wage barely carries him to Saturday's payday. But with all its ugliness the city is the home of culture. It has fostered the art and literature of the past and is producing the mechanical progress of our own day. Its great social and economic complexity creates difficult government problems.

The period of greatest growth in urban areas has occurred within the memory of persons now living. Before the Civil War we were an agricultural people. The armies of that war were drawn from plantations and farms and small towns. The industrial revolution had not arrived in its full force. The metal-pro-

tected battleship was a product of that war. Railroads, essential to urban development, were in their beginnings. A little over half a century later, the World War was fought by an industrialized United States, and its armies were drawn from cities and rural areas in roughly equal proportions. At the present time our urban population overbalances the rural. Well over half of our people live in cities and towns of over 2,500 inhabitants.

All urban areas do not present the same problems. Some are largely commercial, some are predominantly industrial, some even, such as Washington, are political. It will be noted that practically all cities of any size lie on navigable waters. Most of them have originated at points where trade passed from one means of transportation to another, necessitating the presence of workers. Some exceptions occur on the sites of oil booms, or of gold rushes, or where a city is established for a political purpose; but even here a break in transportation may be a secondary cause. Washington, a political city, was established close to, and now includes, Georgetown, an old seaport at the head of Potomac navigation.

While most cities originate from commercial causes, they do not necessarily remain commercial. They may later attract industries, become railroad centers, and flourish long after the original causes for their existence have been forgotten. In fact, the greatest factor in the enormous increase in the size of cities in the last hundred years has been the development of industry, which has resulted from mechanical inventions, particularly the steam engine.

Legal Status

In legal status the American city is a public corporation, capable of suing and being sued, and with the right to a corporate seal. The debts of the city are owed by it as a corporation.

The city is not liable in damages for injuries caused in the performance of its public functions. If a fire engine, even through negligence, crashes into an automobile, the city may not be sued, for the fire department is established by the city in carrying on its public functions as a representative of the state, which, as sovereign, cannot be sued. Of course, if consent is

given, the city may be sued. Also, it is true that the driver of the fire engine might perhaps be sued upon his negligence, but courts are slow to grant damages in such cases, and moreover, it would be difficult to collect from an individual employee even though the court should grant a claim. If a child is injured through the faulty construction of a public school, the parents cannot sue the city, for education is a public activity. Neither can suit be brought against the city for injuries received in the city hall or in a courthouse, or for injuries resulting from mistreatment by police.

On the other hand, if the city undertakes to conduct a street railway or a municipal gas or electric plant, injuries due to negligence may lead to suit against the city, just as they would against a private corporation, for these are considered private activities of the city. There is no definite rule for determining what is a "private" activity and what is a "public" activity from the point of view of liability to suit. Historical considerations play a part in influencing the courts. Some activities on the borderline are held to be private in one state and public in another. The streets usually are considered private, although roads in the country usually are considered public. However, there is much variation between the states upon this matter. Other activities considered in some states public and in some private are in connection with waterworks and parks. The construction of sewers is usually held to be public in nature, while their maintenance is usually held to be private. Upon all these matters the tendency at the present time is to make the cities liable in doubtful cases.

Politically, the American municipality is a creation of the state legislature. The legislature may establish or wipe out cities, expand or reduce their geographical limits, and add to or take away from their powers, almost at will. The only substantial limits on its power in this respect are those provided in the state constitution. In very rare instances the legislature may find itself limited by provisions of the federal Constitution, such as that prohibiting a state from impairing the obligation of contracts. At one time the legislature of Alabama wiped out the City of Mobile by repealing its charter, and substituted in its place the Port of Mobile, comprising substantially the same in-

habitants. Since the City had been abolished, it was argued that there was no way to collect upon debts owed by it. However, the courts took the position that the new corporation must meet the debts of the old City, since it included practically the same inhabitants and taxable property. Otherwise, the obligation of the contracts of the City would have been impaired (Mobile v. Watson). This decision did not deny the right of the state to abolish the city, but it did prevent that abolition from relieving the inhabitants from payment of its debt.

The charter of a city itself is not a contract within the meaning of that clause of the federal Constitution which prohibits impairment by states of the obligation of contracts. It is, therefore, subject to alteration by the state. The charter of a private corporation is protected by the contracts clause, but the city is a public corporation and is not so protected. The city is primarily an agent of the state and subject to its will. In performing its public functions it acts for the state. In general, a state has such complete control over a city that it may add to its territory and thereby bring property within the limits of the city which may be taxed to meet its accumulated debts, or may exclude territory which thereby escapes taxation even for benefits already received.

In general, it is the city itself as a municipal corporation, not its inhabitants or its territory, that is responsible for its debts. In some New England states, an exception to this rule has occurred where the property of individual inhabitants has been seized by creditors of the corporation. Such action has never been permissible in this country outside of New England, however. The individual can be reached, therefore, only through the process of taxation. The case of Mobile, cited above, represents another type of exception to the general rule that it is the corporation itself that is liable for its debts.

Limitations on the Legislature

Limitations in a state constitution calling for a plebiscite in areas affected by acts annexing territory to, or separating terri-

¹ See p 527

tory from, a municipality are, of course, binding on the legislature. Even in the absence of constitutional provision the latter may, if it desires, order a vote in areas affected by proposed legislation and base its action upon the result.

Some state constitutions contain many limitations upon the legislature in respect to municipalities. They may provide that charters are to be granted according to certain principles, as that the acts granting them must be general in nature, or by a certain procedure, as that they must be framed and enacted by the people to be affected. Some constitutions contain provisions restricting the granting of franchises, others fix debt limits upon cities so that the debt may not go beyond a reasonable ratio in relation to property values or become so large that it cannot be met out of current revenues. The legislature possesses the residue of powers, however, and these usually are very great.

Methods of Granting Charters

Municipalities receive their charters from the legislature. The older method of granting charters was by special act in each case. This plan has the advantage that the charter can be so designed as to fit the exact circumstances of each municipality. No two cities are alike. Some are commercial, some are industrial, some are concentrated in a small area, some straggle out over a large territory, some have important harbors, some center around railroads, some have a large element of foreign-born living in alien ghettos with Old-World traditions, some are composed largely of native-born inhabitants. Incorporated municipalities range in population from a few hundred inhabitants to cities of millions. Each has its own special problems, and its charter must be adapted to its needs. The special charter plan presumably facilitates the process of adapting the charter to these special needs. Alterations, as they become necessary, are made by amendments in the form of subsequent acts of the legislature. The latter, through its committees, holds hearings in each case. At these hearings the municipality, or the people involved, or special interests affected by the proposed legislation may present their cases.

Objections to the special charter plan lie in the large amount of time spent by the legislature in considering the special needs of localities where the interests of the state as a whole are not affected. Lobbying by special interests has been prevalent, so that the wishes of the people of a community may be set aside in behalf of a small but powerful group.

At the other extreme from the special charter plan is home rule. Under the home rule charter plan the voters of each municipality are permitted to elect representatives to a convention for the purpose of drawing up a charter. The convention usually is called by petition of a certain number of voters or by action of the old city council. The charter proposed by the convention is submitted to the voters and usually becomes effective when approved by a majority, but sometimes a higher percentage is required. Future amendments likewise are made without state interference.

The home rule plan carries out most completely the idea that each community is the best judge of its own needs. However, it has the objection that no community lives entirely to itself. The way in which it deals with such subjects as crime and sanitation is of importance to the state as a whole as well as to the citizens of the community. When state and local elections are held together, it is of concern to the state that they be conducted properly. Even in local finances the state may have an interest, for local debts may become so great as to impair the borrowing power of the state itself, which depends upon much the same sources of taxation as the local governments. The home rule plan ignores this interest of the state as a whole in local government.

Intermediate between the individual charter plan and home rule there are several plans that attempt to avoid the weaknesses of either extreme. Probably the best of these is the optional charter plan, under which the state draws up a number of charters from which the community may take its choice. This gives to each city a reasonable amount of freedom in determining its form of government and yet insures that the interest of the state as a whole are protected. The charters from which choice may be made may include a mayor and council plan, a commis-

sion plan, and a city manager plan, with perhaps variations on these types.

Another charter system, which attempts to avoid some of the defects of the special charter plan, requires that the same charter may be granted only to groups of cities classified according to size. Unfortunately, population is not the only factor in determining the character of a city, and therefore the fundamental assumption of the classified charter plan, that cities of the same size should have the same charter, is not satisfactory. Moreover, a city that increases in population may find itself with a charter adapted to the needs of a smaller city, or may be compelled to break the continuity of its political development by changing to a new form of charter.

In some states there is a general charter plan, requiring that all legislative acts dealing with cities be general in nature. No law may be passed which deals specifically with only a single city. This plan avoids the evil effects of state interference with individual cities but has the serious defect that if severely interpreted, it would provide a fixed type of government to all cities large or small and of whatever nature. However, its restrictions are subject to evasion. Unless prevented by the courts, the legislature may pass "general" laws which describe in each case the type of city to which they refer, but the type described may be so restricted by limitations of population or other characteristics as to apply only to a very small number of cities. If a description is made too specific, as, for instance, to apply only to a single city, the courts may hold the act unconstitutional, but on the whole the courts hesitate to intervene. An interesting variation upon the general charter plan exists in Illinois, where by general act a certain number of offices are provided for each city, with the power on the part of the city council to increase the number of offices if it so desires. In this way, the general charter plan is given some of the aspects of home rule.

No one of these various types of charter plan possesses all of the good features of the others. The problem is to provide a charter for each city which is adapted to its peculiar needs, that does not neglect the interests of the state as a whole, that protects the city from the lobbying of selfish groups, and that does

not require that the state legislature fritter away its time upon purely local matters.

The Interest of the State

The state has a certain interest even in local matters. In our early history, this interest was a small one. Each settlement and town stood to itself. There was comparatively little intercourse. With improved means of transportation and increased communication between urban areas, with modern conceptions of the transmission of disease, with the extension of the area of operation of criminals, and with the problems arising from larger urban areas, the interest of the state in local affairs has increased. As a result, the state has stepped in to establish a measure of control over certain local matters. Now there are such bodies and officials as state boards of health, state election officials, state superintendents of schools, state public utilities commissions, state civil service commissions, state police and state financial officials. All encroach upon the powers of local bodies. In general, their work is of a supervisory nature, however, and does not amount to direct control of the subjects within their jurisdiction. The local bodies continue to function under their supervision. In some cases they merely supplement the work of the local officers. An increase in the number and powers of such bodies appears to be inevitable. They bring a professional element into local government and in addition provide a broader point of view than that of elected local officers. Compared with legislative control they afford a better means of developing consistent policies in relation to municipalities. State control through these administrative bodies is direct and positive, whereas charter provisions are merely negative or indirect in the protection they offer to state interests.

The French system is the best example among the democracies of a "centralized" administration in which the national authorities, corresponding in this instance to our states, retain a large degree of control over municipal affairs. French local government has impressed its influence in many other countries, such as Italy and the republics of Latin America. The basic features of

the system were introduced by Napoleon in 1800. France is divided into departments, which are quite different from the American states, since they are primarily administrative divisions of the central government rather than independent areas of local government. In each department there is a prefect appointed by the central government and acting as its representative in administration. The departments are divided into arrondissements, or districts, each under a subprefect. Through these administrative officials the national government exercises a close control over municipal affairs. The city councils are forbidden to criticize the prefect or other national officials, and members may be suspended for a period by the prefect, or the council dissolved for two months by the President of France. Mayors may be suspended from office or even removed by national authorities. In addition, the national authorities possess direct powers in relation to many municipal activities. Although the mayor has charge of the police, he exercises his powers in this respect under the supervision of the prefect. The members of the police department are in part appointed by national officials, and of the remainder, all important appointments must receive approval from the department. Franchises are granted by national authorities. While the council votes the budget, the prefect may add to the proposed expenditures items which are required by law, and the required items make up a large part of the list. He may make reductions in items of expenditure and may raise or lower the estimates of receipts. When the council fails to pass a budget, he may promulgate one sufficient to meet the needs of the municipality. Large borrowings must be approved by the national authorities. Poor relief likewise is controlled from above, with only the proviso that the advice of the council must first be secured. Important or through streets are regarded as of primary concern to the state and are removed from the control of the municipal authorities. Despite all these limitations, however, the council does exercise a potent influence upon local affairs, for it possesses the residual powers over matters affecting the municipality, and councils have not been apathetic toward the exercise of their powers.

In England, the central authorities exercise less direct powers of control than do those in France. However, a municipality may not borrow without their approval, and this gives a large degree of central control over local activities. Indirect control is exercised through "grants-in-aid," which may be withheld if certain conditions are not met. Approximately half the cost of local police is met by such grants, with the proviso that the department must meet the standards set by the central authorities. A similar type of supervision is maintained over some forms of public education.

Organization of the Council

Early municipal governments in this country were modeled upon the English system of the time. They were unicameral, consisting of councillors, aldermen, and a mayor. The councillors and aldermen were elected by the voters. Aldermen and councillors differed mainly in respect to the longer term of the former. In the Colonial period, the mayor usually was chosen by the governor. After the Revolution he was chosen by the governor or by the aldermen from their own membership. His term was one year and he had none of the powers possessed by the mayors of a later period. He did, however, possess some independent judicial powers. In New England there was a distinctive township system, with its town meeting, which is described elsewhere.²

The abandonment of the unicameral councils and their replacement by bicameral bodies appears to have received a great impetus from the setting up of a bicameral national government under the Constitution. The influence of the national system, with its checks and balances, its executive veto, and the approval of appointments by the upper chamber, appears to have extended down through the states to the cities. Our cities acquired charters in the form of cumbersome and complicated copies of the national Constitution. Perhaps this was one contributing cause to the decline in the quality of city government in this country.

² See p. 427.

Graft and Corruption

Just after the Civil War a great expansion took place in the numbers and populations of our cities. This expansion was accompanied by changes in the physical equipment of cities. The use of gas for purposes of street lighting was extended, municipal waterworks replaced the neighborhood pumps, asphalt streets replaced cobblestones, underground sewer systems were installed. These changes called for the expenditure of money, and profits were to be made in municipal contracts. There were franchises to be granted to street railways and to gas companies. Fortunes were to be made in city contracts and in the sale of franchises. This era justified the statement of Bryce in his American Commonwealth that city government was "the one conspicuous failure" of the United States. While a "reform" government coming in on a wave of popular wrath against the corrupt bosses and rings might secure control of a city for a brief period, the reformers would soon be defeated by the regular politicians and the city would return to normalcy. The cumbersome governmental organization of our cities contributed to this. Power was so divided between the mayor, the two chambers of the council, and various officers, that responsibility for government could not be fixed. Neither the mayor nor either chamber could be held accountable for mismanagement, and responsibility was passed from one to the other. As a result all went unpunished. At the same time, reform governments found it difficult to establish themselves in control or to maintain control after it was secured, since the battle against the political machine had to be fought upon so many fronts.

The Commission Plan

Reform in city government came with the opening of the new century. In 1900, the city of Galveston, in Texas, was visited by a tidal wave from the Gulf of Mexico that destroyed a large part of the city. The old city government was too cumbersome to act with the necessary promptness and decision. Already, before the disaster, there had been talk of reform. The city found the solution of its problem in the establishment of a commission of five citizens, who in the crisis exercised all the

municipal legislative and administrative powers. The experiment was found so successful that the plan was continued. Other cities adopted it and the commission plan began the movement of reform in American city government.

The commission plan calls for the popular election of a commission of five men, who constitute the municipal council. They pass the city ordinances and determine all matters of policy. As individuals, each member heads one of the five administrative departments. The departmental divisions may vary, but the fire and police departments may be grouped together as a department of public safety; streets, waterworks, and other engineering activities may be grouped together; finance may constitute a separate department; health activities another; legal activities another; and various other functions may be added to whatever department appears most logical or convenient.

The members of the commission are not chosen by districts but from the city at large, usually for terms of two or four years. Sometimes the terms overlap, three commissioners being chosen one year and two the next. If they were chosen by districts, it would result on the administrative side in the control of one department of government by each district, although the work of each department affects the whole city. One of the commissioners has the title of mayor and acts as official head of the city government. Ordinarily he heads a department as do the other commissioners. His duties as mayor usually are purely formal and carry no real powers.

The commission plan has an advantage over the old mayor and council plan in its simplicity. The complete responsibility for the government of the city rests in the hands of five men. Its disadvantages lie in the system of administration, for the supervision of the administrative work is with men who are not technically trained in the problems of their departments. Moreover, an arbitrary division into five departments may not fit the needs of the city, especially if it is a large one.

A great many cities adopted the Galveston plan. Des Moines added certain refinements, including the initiative, referendum, and recall.³ These innovations permitted the electorate to enact

³ See pp 311, 339.

ordinances without reference to the commission, provided a process for a popular vote upon ordinances passed by the commission, and made individual members of the commission subject to removal by popular vote before the expiration of their terms. Des Moines also provided for the nonpartisan primary⁴ in the choice of commissioners and for civil service examinations for employees.

The City Manager Plan

The next step in the improvement of city government was again, at least in part, the product of a local emergency. In 1913, the city of Dayton, in Ohio, was visited by a flood, and a movement for reform which already had begun was accelerated by the necessity of setting up a new government to meet the emergency. The city adopted a variation upon the commission plan that contains elements of distinct originality. It is known as the city manager plan. Some small cities had previously instituted similar systems, but it was from Dayton that there was started the national movement for the city manager plan. The controlling body under this plan is a council elected by the people. It exercises the legislative powers of the city and has final control of all matters of policy. It does not, however, attempt directly to administer the city departments, but instead chooses a city manager who becomes the head of the administration. The organization is similar to that of an American business corporation. The functions of the commission are similar to those of the board of directors of a business corporation, while the city manager corresponds to the corporation manager. The Dayton model has been followed in a large number of cities.

The council in the city manager plan may be made more representative than the body of five in the commission plan, for it does not act as an administrative body and hence is not under the necessity of keeping its size to a minimum. A body of twenty-five is not so large as to be unwieldy for purposes of policy determination and is more representative of all elements in the community than a body of five. The council consists of laymen, for with no administrative duties to perform, technical

⁴ See p. 445.

qualifications are unnecessary, and attendance upon its meetings requires only a small part of the member's time.

The key position is the office of city manager. It should be held by a technically trained and permanent official. The city manager is the head of the administrative forces of the city. The departments are all under his direction and their heads are his appointees. He attends the meetings of the council, where he furnishes technical advice and makes recommendations upon matters of policy. While the council is finally responsible upon matters of basic policy, it should give most careful heed to his recommendations.

The German Burgomaster

The city manager plan represents an effort to introduce a professional element into the central administration of American cities. Hitherto the professional employees have been, at the most, heads of departments. The city administration has been controlled by laymen.

Other countries have made a greater use of professional administrators. This has been especially true of Germany, where, even before the establishment of the dictatorship, professional administrators played a large part in city government. Before Hitler, a common form of city government included a council of laymen and an administrative board of a mixed nature, including both laymen and professional administrators. The professional administrators had an influence far beyond their numbers. They were selected in open competition from among applicants who did not need to be from the city that employed them and were chosen primarily for their special qualifications for the departments with which each was to be associated.

At the head of this administration board was the burgomaster, who was also the official representative of the city. A burgomaster would begin his experience in a small town or in an inferior capacity in a large one. A successful official would rise from a small town to a larger one or be promoted to a higher rank until he became burgomaster in a large city. Experience, training, and capability were the factors in promotion. The system produced an excellent body of officials. The city manager plan in

the United States centers around the city manager, who resembles no other official so closely as he does the German burgomaster of the predictatorship period.

Under the dictatorship, the professional element has acquired even greater power. The council has been abolished, except that the burgomaster has a council of advisors who have no powers, and the burgomaster has been given authority to issue local ordinances after the advisory council has expressed its opinion. The burgomaster and the chief administrative officers still are chosen from the ranks of trained administrators. The local party agent of the Nazi party makes nominations for each vacancy and the higher officers of the state select one from these. Administrative officers must be sympathetic to the Nazi government. Other municipal employees are appointed by the burgomaster.

The city manager plan has not been in effect in this country a sufficient length of time and has not been generally enough adopted to produce a corps of officials with the same influence as the German burgomaster. A sympathetic public opinion is necessary to the success of the system, and the traditions of American city government have not been such as to encourage its growth. Centering around the city manager, as the plan does, it is essential that this official be selected with the greatest care. No local politican should be chosen for an office that calls for so great a degree of professional devotedness and technical ability. Unfortunately, provincial pride and ignorance of the necessity for a professionally trained man may lead the city into the choice of an unqualified local politician for the office In such circumstances the city manager plan will provide no better government than any other system, for it centers around the idea of a professional nonpolitical administrator.

The Strong Mayor Plan

It is interesting to note that despite the great spread of the commission and city manager plans, they have been confined almost entirely to the small and middle-sized cities. The large cities have been content to reform the old mayor and council sys-

tem. This reform has consisted in a simplification of the traditional mayor and council plan, together with a strengthening of the hands of the mayor. Most of our cities, including the very largest ones, have reduced the council to a single chamber. In many places the mayor has been given a larger appointing power, so that his appointments do not require approval by the council. He has a greater control over the budget, so that the council can reduce but cannot increase or add new items in the budget. He exercises much the same control over the administration as does the city manager. The chief difference lies in the fact that the mayor remains an elective officer, serving for a fixed term. He is not, therefore, a permanent career official. This reformed mayor-council plan is sometimes called the strong mayor type of city government and may be classed with the commission and city manager plans as a new type of city government.

Tendencies

These reform movements in American city government have at least one common characteristic. They all concentrate responsibility into fewer hands. The commission form vests all legislative and administrative functions in a body of five commissioners. The city manager plan places ultimate responsibility in the commission, while centering the administrative powers in the manager. The strong mayor type strengthens the hands of the mayor as the head of the administration. The reduction of the council in so many cities to a single chamber is further evidence of this movement for the concentration of responsibility. In addition, the city manager plan has one characteristic not common to the others in that it recognizes the need for experts in government.

Medieval Towns

The problem of government in a medieval town was a simple one compared with that in a great modern city. Policing in a community in which mutual acquaintance was extensive was not likely to be a difficult one. Where mechanical fire apparatus was unknown, there could be no large municipal activity in the ex-

tinction of fires. Activities in relation to health were almost unknown. Water was secured from individual or local wells, and refuse, garbage, and sewage disposal were not looked upon as public problems. Education was an individual question or was undertaken by the Church. Building regulations were of the simplest nature. The largest engineering problem of the city was likely to be the erection of its church, and this was only a semipublic activity and extended over a long term of years. Business and labor were regulated by the merchant and trade guilds.

Colonial Towns

Colonial towns were little different in the nature of their activities from those in England centuries before. Improvements in transportation, the mechanization of industry, the consequent concentration of population in modern cities, new ideas concerning sanitation and disease, engineering problems, and the development of various public utilities have all contributed to the extensiveness and complexity of modern city government.

Education, Police Protection, and Health Activities

The modern city is confronted with administrative problems of a more difficult and complex nature than those facing the medieval and colonial towns. Some of these problems are of such a nature that they are in reality only a part of the larger problem with which the state must deal. This is particularly true of education, police protection, and health activities. Municipal education is closely related to the whole state educational program. The state relies mainly upon the municipal police to enforce its laws within the city limits. Municipal laxity in the enforcement of health regulations may create a menace to the health of surrounding areas. For these reasons, the educational, police, and health work of the city are discussed elsewhere⁵ in their relationship to the larger problem of state and national efforts to control crime and disease.

⁸ See pp 734, 743, 764.

Fire Protection

American fire departments are the finest in the world. They have the fastest and most powerful engines and their other apparatus is the very best. Nevertheless, we lose more by fire than any country in the world. Our houses are still to a considerable extent of frame construction. Most European houses are built of stone and noninflammable materials, and American travelers in Europe are impressed with the appearance of permanance in the buildings. This permanance may sometimes be a disadvantage, for blocks of old stone houses without proper sanitary arrangements are difficult either to modernize or destroy. Their construction, however, offers a protection against fire. Another contributing factor in our heavy losses has been the lack of proper preventive measures to reduce the causes of fires. We need our fine apparatus.

The recruitment of men for the fire department offers some difficulties from political interference. However, the need for technically informed fire chiefs seems to be better recognized than the need for professional police superintendents. Moreover, the danger of alliance with criminal elements does not exist as in the police department, and the number of men employed is smaller. Recruits to the fire department are put through courses of training, physical and technical. Large departments also have special details for branches of rescue work. Often the departments are called upon to aid in forms of rescue somewhat removed from their main functions. The resuscitation of partially drowned persons and of victims of gas poisoning are examples.

Engineering

The engineering department is concerned with the planning, grading, and paving of streets, the building and maintenance of sewers, waterworks, and lighting plants, the erection of public buildings, the laying out of parks and playgrounds, the approval of plans for private buildings and subsequent inspection to determine their structural safety, and other matters involving the technical services of engineers. In large cities, the engineering work may be so extensive that it is not thought best to unite all activi-

ties in one department. In such cities there are several departments, each having charge of a group of activities.

As in the case of the police department, the quality of the engineering department is dependent upon maintaining its freedom from politics. Much of municipal corruption has occurred in connection with the letting of contracts for municipal construction, and corrupt politicians find the engineering department a most profitable field of activity. By various means their own contracting companies are given a preference in supposedly open competitive bidding, as, for instance, by specifying requirements that only one company can meet. Loopholes in the laws are found to permit evasion of the requirement of open bidding. Lax inspection while the work is in progress may permit evasion of specifications. The European practice of employing a permanent professional engineer who has prepared himself especially for municipal service as a career would seem to be one of the best safeguards of efficient and honest work in this department.

A pure supply of water is necessary for the health of a community. The great modern cities sometimes must go many miles to secure a supply of unpolluted water. The city of New York, for instance, brings its water from the mountains a hundred miles away. Other cities may find a convenient source in a nearby river. It is seldom that there can be found a supply of sufficient purity that some sort of treatment is unnecessary. Basins must be built in which the water stands for a period to allow sediment to settle. A considerable degree of purification from disease germs takes place at the same time. Then it may be run through filters, further removing impurities. After this, it may be necessary to treat the water with chemicals to kill the germs that remain even after filtration. Then it goes into reservoirs from which it is pumped or run by gravity into mains and eventually piped into residences and other buildings. Since two systems of pipes are not customary, the purified water is used for flushing sewers and cleaning streets. This appears to be an enormous waste, but the construction of separate pipe lines might be even more expensive.

The per capita use of water in American cities is the greatest in the world. Much of this is due to waste that comes from

carelessness. It has been customary to charge householders a flat rate for water. This encourages waste, for there is no incentive to repair faucets and correct other causes of wastage. On the other hand, it is undesirable to discourage the reasonable use of water among the poor. Possibly a sensible balance can be obtained by furnishing without charge, at least to homes, a fixed amount of water which is sufficient for drinking, cooking, bathing, and cleaning, but with a meter rate beyond this amount.

Although American cities do not ordinarily operate the municipal transportation, electricity, and gas systems, usually the water plant is owned and operated by the city. The importance of a properly maintained water supply from the point of view of health and fire protection is too great to be entrusted to a commercial concern. Moreover, water must be supplied to poor people free or at very low rate, and this service could not well be required of a private concern. Objections to a publicly owned water supply as "socialistic," therefore, have not been considered valid in American cities.

The disposal of sewage involves problems as great as those that arise in connection with the water supply. Many American cities run their sewage into some convenient stream. This may be entirely satisfactory if the stream is large, but other cities down that stream may be dependent upon it for their water supply. When Chicago turned its sewage into the Mississippi, it was feared that a problem was being created for St. Louis, which drew its supply from that river. As a matter of fact, the distance between the two cities was so great as to permit settling and purification to take place long before the water reached St. Louis, so that at that city it was not above the normal in bacterial count. Large bodies of water can take care of enormous amounts of sewage. The use of sewage as fertilizer on municipal farms has been tried abroad. Another method of disposal involves the use of septic tanks in which bacterial action destroys the harmful organic matter. Various other methods of treatment are in use. The adequacy of any method of sewage disposal depends upon the circumstances of each city. However, as the number of cities continues to increase and their populations grow, the need for improved methods of treatment will become greater.

The disposal of garbage is not so serious a problem as that of sewage disposal. Some cities dispose of garbage to contractors who maintain hog farms and feed the garbage to the animals. New York carries it out to sea and dumps it overboard. In some places it is destroyed by burning. Some cities dispose of ashes and garbage together, the combination of the two resulting in chemical action upon the organic refuse. Others use the most modern method of garbage disposal, that of converting it into grease and fertilizer at municipal reduction plants.

Ashes constitute the cleanest type of refuse. They present no problem of disease and require no form of treatment before disposal. Other forms of refuse are salvaged, burned, or thrown out on the municipal dump.

One of the more recent of municipal activities is known as "city planning." Obviously, the opportunity does not often occur to lay out entirely a city in advance of its development. There have been a few such cases, however. Washington is an example. L'Enfant, a French army engineer, worked out a comprehensive plan for the development of the new capital on the banks of the Potomac, and while it has been deviated from in part, it still constitutes the foundation plan of the city. Most city planning must be superimposed upon a city already in existence. It is confined to plans for areas into which the city is expanding and to conservative modifications in old areas. There have been a few instances in which more radical action has been taken. An example of a replanned city is Paris. Under Napoleon III, buildings were torn down and broad avenues laid out, giving the French capital its modern appearance. A sewer system was installed and the ducts were so arranged as to permit other utilities to be installed. The water, telegraph, telephone, and electric systems, therefore, are carried in the upper part of the mains. Paris is one of the best planned of the world's capitals.

City planning is confined primarily to the physical aspects of the municipality. It involves the proper laying out of streets and parks, the most economical and convenient construction of sewer lines, and gas, electric, and transportation systems, and the location and construction of public buildings.

A recent phase of city planning is known as "zoning" Certain areas are restricted to residences, others may contain shops, others may contain warehouses, others factories, others gas plants and the like. The height and construction of buildings in each area are defined. The number and nature of the classifications, of course, depend upon the city fathers. The constitutionality of zoning laws was long in doubt, but in the case of the Village of Euclid v. Ambler Realty Co., a zoning law was upheld as a valid exercise of the police power.⁶

Public Utalities

Some American cities have experimented with municipally owned and operated electric plants, and a few with gas plants and street railways. In view of the limited scale on which they have been tried, especially in the case of gas plants and street railways, and the inadequacy of their accounting systems, it is difficult to form a judgment upon the financial success of these enterprises. Even where it appears that such enterprises are being conducted at a profit, the accounting systems may be so inadequate as to conceal the true state of the finances. Most cities rely upon private enterprise to furnish transportation, gas, and electricity. Most states have set up public utility commissions to exercise general control in the interest of the public over the rates and services of the local utilities. The cities still retain much power over utilities, however, since their ordinances upon traffic and other matters must be obeyed, and the local taxing power must be reckoned with. The regulations of these commissions are valid if they are reasonable and if they permit a fair return upon the investment of the operating company.

In European countries municipal ownership of such utilities is much more common than in the United States. In Great Britain and Germany probably more than half of the gas, electric, and street railway systems are municipally owned.

The question of municipal ownership in the United States is too often discussed on an emotional basis, the opponents of public ownership charging that it is "socialistic," and its supporters

⁶ See p 553

⁷ See p. 553.

pointing to the politics and graft in the granting of franchises and other abuses under the system of private ownership. As a matter of fact, the success of any system of publicly owned utilities depends very largely upon the efficiency of the administrative machine. Where the administrative force of a city is pervaded with politics or where the public conscience is too dull to be shocked by abuses, it is unlikely that any system of public ownership will be better than the existing system. It seems rather futile to propose that municipal governments should be further burdened with administrative duties when they meet so inadequately the problems that they have inherited.

In the granting of franchises, the regulation of public utilities, and the letting of contracts, municipal scandals have often occurred. The paving contractor who is permitted to use a thinner layer of concrete or a lower quality of paving block than the specifications call for is expected to show his gratitude in a substantial form. Franchises giving a transportation, gas, or electric company special rights in the use of public streets may be granted only after the local bosses have been convinced of the worthiness of the project by evidence which bosses are able to appreciate. A public utility may be threatened by proposed ordinances increasing its taxes or imposing new burdens or restrictions upon it—until the harassed officials of the corporation have propitiated the proper members of the council with arguments that can be deposited in the bank.

Public utilities themselves no doubt have been guilty of about all of the abuses of which they were capable. They have bribed councillors, secured enormously valuable privileges for a song, often charged high rates for poor service, and in addition to mulcting the cities, have deceptively taken money from investors. It should also be remembered, however, that public utilities have been considered fair game for demagogic politicians who find it easy to arouse the voters against corporations that have little defense against injustice except through indirect methods.

Probably the best solution of the problem of utility regulation lies in state laws limiting the terms of franchises and laying down general principles to be followed by the cities in granting them. Formerly valuable franchises were granted for long periods or in

perpetuity. Now it is the practice to limit them to a term of years. Various provisions affecting rates and service also are included in the franchises, and public utility commissions are set up to provide regulations that will be fair both to the corporations and to the public.

Discrimination Against Cities

Some special problems have arisen in the relationship of the city to the state. In many states the urban areas are underrepresented in the state legislature. By using the county as the basis of representation and giving to each county at least one representative regardless of population, by limiting the number of representatives from any county, by outright restriction of the number of representatives from a single city, or by some other device, the urban areas are underrepresented on the basis of population. One reason for this discrimination is that a strict carrying out of the idea of representation in proportion to population would give to densely populated units a dominant position in the state government. Where a city like Baltimore, containing half of Maryland's population, is underrepresented, it is argued that no single unit should be in a position to dominate a legislature, as would be the case if it were represented on the basis of population. Another reason for the underrepresentation of great cities is the deep-seated conviction that cities are the home of iniquity. A more practical basis for the discrimination is the fact that rural areas at present dominate state politics and do not relish the idea of surrendering their power.

The Metropolitan Area

A modern phenomenon is the "metropolitan area." Land prices in a great industrial city may become so high that factories establish themselves in the surrounding country where land is cheaper. Reasonable proximity to the city is necessary in order to make use of its railway and other transportation facilities. A town may grow up around this factory, housing its employees, and eventually other factories may be attracted to the neighborhood. Another type of suburban area is the residential town,

inhabited by families of which the heads are employed in the city. The universal use of the automobile is adding to the numbers of these "commuters" who each morning leave the suburban communities for their employment in the city and return at the close of the day. The central city together with these towns outside its municipal limits constitute a single economic unit. Politically each is a separate unit for purposes of local government. Some states, confronted with the problem of bringing about a proper coordination, have treated the whole as a single metropolitan area for purposes such as transportation and sanitation.

Decentralization

City populations even more than those of rural areas feel the effects of the business cycle; that is, they profit more from periods of "boom" or great business activity, and they suffer more in periods of business depression. At the bottom of the cycle, the farm population may manage to eke out at least an existence, but the city man who is cut off from the payroll is faced with starvation. This is in part due to the greater amount of specialization in congested areas. When the steel mills close, the workers cannot easily turn to other industries, especially as there is likely to be general unemployment at such times.

A suggested remedy for this situation is the decentralization of industry. When electricity was first applied to manufacture, it was thought that since it constituted an easily distributed source of power, industries might leave the cities and establish themselves along the electrical power lines. Thus, the national industrial life would be disseminated over the country instead of remaining concentrated in great cities. Workers would be employed part of the day in factories along the highway and would reture in the afternoon to the surrounding country, where lay their pleasant cottages surrounded with land cultivated by themselves. In periods of depression they would not starve, for living would be cheap, and they would have a source of subsistence from their small farms. This, however, has not come to pass. Industry has not become decentralized, partly because of the transpor-

tation problem, since industries cannot afford to leave the rail-road centers.

During the recent great depression some efforts have been made to develop with federal aid "subsistence homesteads" or small farms on which unemployed families might raise enough food for the necessities of life. Small industries have also been set up in such communities as a source of supplementary income. This, however, has been on a small, experimental scale. There is no evidence that these experiments are leading the way in a movement of industrial decentralization. It is likely that industry for an indeterminate period in the future will remain concentrated in the cities.

The Place of the City in the Economic System

The modern city is the product of an industrial civilization. Without railroads, telephones, elevators, local mechanical transportation facilities, and steel framework for buildings it would not have its present physical aspects. Without mills and factories its workers would not have employment. At the same time many of its most serious problems are the result of maladjustments in the complex national economy that accompanies a highly developed industrial organization. Modern cities and the modern economic organization are mutually dependent. As the city meets its problems, it will relieve distress that results from economic maladjustments, and as corrections are found for weaknesses in the economic system, municipal problems will be simplified to that extent.

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CHAPTER XXI

County and Local Rural Government

Rural Problems Different from Those of Urban Areas

Local rural government presents very different problems from the government of municipalities. In the first place, its problems are simpler. The country areas are primarily agricultural and there is greater uniformity of life among the inhabitants. Usually there are no complex racial problems, and customs and inherited attitudes of thought present smaller variances. Less density of population in itself makes the governmental problem simpler, for there is less friction where men are not compelled to live in close proximity to one another. Moreover, the rural localities are different from cities in that they have little in the nature of private local interests. Their activities are more in the nature of fractions of larger activities of the state as a whole. For instance, the roads in rural areas are necessary for all travelers as well as for the local inhabitants. The city streets, however, exist primarily for the use of the inhabitants of the city. The difference, of course, is one of degree, but nevertheless it is so great that it has received recognition in the courts.

The government of rural areas reflects these differences in the economic and social complex. In the first place, the governmental machinery is simpler. Fewer officers, boards, and commissions are needed to enforce the comparatively simple local regulations, to carry on the limited administrative work, and to conduct the small number of welfare activities. Moreover, since local activities really carry out functions of the state as a whole, a large part of the administrative work is carried on by state officials or is supervised by them.

Another fundamental difference results from the interest of the state in local rural affairs. The boundaries are laid out primarily

with convenience of administration in mind. Municipal boundaries set off the city as distinct from the surrounding country, but the local rural areas result from dividing the whole state into parts. The divisions are made with the entire state administration in mind, and not with regard to the special interests or desires of any single area, as is true when a city is incorporated. The powers of the local rural communities, likewise, are granted by the state rather as a parcelling out of its own administrative functions, and not, as in the case of the incorporation of cities, with the idea of creating an entity with independent local interests.

Legal Status

Proceeding from the differences noted above, there are certain legal differences between the status of rural governmental areas and that of municipalities. Except in New England and in Louisiana, the most important unit of rural government is the county. It is regarded as a "quasi corporation." This term cannot be said to have a definite meaning, but practically it denotes a body that is regarded for some purposes as having an independent existence but that is nevertheless primarily an agent of the state. The functions that it performs are, therefore, state functions, and the rules of liability for its negligence or the torts of its officials are the rules that would be applied to the state itself and not those that apply to municipal corporations. Since a county performs no private functions, but only the public functions which it fulfills as an agent of the state, it is not liable to suit in the courts for its acts. A municipal corporation, on the other hand, is liable in so far as it is performing private functions.1 For instance, if an individual is injured as the result of a defect in the construction of a road, he cannot, under this general rule, sue the county, whereas if he is injured as the result of a defect in a city street, the city is, in most jurisdictions, liable in damages.

On the other hand, counties have the status of corporations in some respects, for they not only can bring suit against others, but in respect to contracts made by themselves they are usually

¹ See p 396

held liable to suit. This is not true in all states, however. Neither can it be said that a county is always exempt from suit in cases of negligence, for there appears to be an inclination in some jurisdictions to hold the county liable. Moreover, in a few states counties are held to be municipal corporations. In such states, the courts tend to hold them liable in the same degree as incorporated cities. It is not sufficient, therefore, to rest entirely upon the general rule as to the nonsuability of counties, since the extent of liability may vary with the circumstances of the case and the jurisdiction in which it is decided.

It should be added that since the county is the creature of the state, its liability in suit may be added to by statute or by constitutional provision. A number of states have extended the liability of the counties to suit in various classes of cases.

In New England, the town is the chief unit of local government. The term "town" in New England refers not merely to an urban area but to the surrounding country as well. It is a unit of local government which may include both urban and rural areas. Usually it is much smaller both in area and population than a county in other parts of the country. Historically these towns have performed a larger variety of functions than has been true of counties, and their powers have been more analogous to those of incorporated municipalities. As a result, the legal position of towns in New England has so nearly approached that of cities that although classed as quasi corporations, they possess practically the status of full municipal corporations both from the point of view of powers and of liability. Townships, found outside the New England states, rank somewhat lower in this respect than the New England towns. In Louisiana, the parish is the unit of local government and is classed as a quasi corporation, with much the same legal status as a county. Special districts within a county or overlapping several counties, such as drainage and highway districts, may have the status of quasi corporations.

Variety of Plans of Rural Government

There is no uniform plan of county government for the United States. Each state has its own system, and even within a single state there may be variations. Except in Rhode Island, there

is a county board, which is chosen by the voters in all states except Connecticut. This board is not, however, by any means in complete control of county activities, for there are other officers and special boards that are likely to be entirely independent of the county board. Moreover, a considerable part of county administration is in the hands of state boards and officials or is supervised by them.

The County Board

The county board is known under many other names, such as the board of supervisors or the county court. In the Louisiana parish, the term "police jury" is applied to the governing body. The number of members may be as low as three but may in some instances run up as high as fifty. In Connecticut the board is named by the state legislature, but elsewhere it is elected, sometimes at large and sometimes by districts. Rhode Island, however, has no county board.

Tennessee, Arkansas, and, in part, Kentucky continue the system formerly prevalent in the Southern states, in which the justices of the peace constitute a county court, which is both the county administrative authority and a minor judicial body. While possessing as individuals their powers as justices of the peace, they meet as a court four times a year (quarter sessions) for the transaction of administrative and judicial business. They are no longer, as in Colonial days, a closed corporation, nominating to the governor their own successors and in effect choosing them, but are elected by districts.

The county board, by whatever name it passes, has only such powers as are given to it by the state constitution and the legislature. Its ordinance-making power is of no great consequence, and in some states it has no power to pass ordinances. Primarily, county boards are administrative bodies, exercising control over roads, caring for the poor, levying taxes, and appropriating funds. Not all boards have all these powers, however, and a few states even deny to the board the taxing power, which is vested in other bodies. A licensing power, the equalization of tax assessments, the conduct of elections, and the fixing of salaries of some county officials are among the powers that frequently

are conferred upon the board. The control of many county activities, however, is vested in other boards or elected county officers, and other functions may be controlled by state officers and boards

No Separation of Powers

It will be noted that the idea of the separation of powers has not laid hold upon the counties. In some states, where the old quarter sessions of the justices of the peace are retained for administrative purposes, even judicial and administrative duties are combined.

No Chief Executive

Except in some counties of New Jersey, which have a county supervisor with control over the administration, and possibly the county judge in Arkansas and an officer known as the "ordinary" in Georgia, it cannot be said that any of our counties have a chief executive who can be compared with the mayor of a municipality. Our counties have no official head. A few counties in the South and a few New England towns have experimented with the manager plan, but it has not taken hold as a reform measure.

The Sheriff

The sheriff is an elected official everywhere except in Rhode Island, where he is chosen by the legislature. Although the office has lost much of the dignity that surrounded the old reeve of the shire who represented the king in the community, it nevertheless retains some of its ancient characteristics, for the sheriff is still the authority for the maintenance of the "king's peace." In addition to being the peace officer of the county, the sheriff is also an officer of the local court, serving its writs, maintaining order, and executing its judgments. He appoints a number of deputy sheriffs and in time of disorder, or where it is necessary in hunting down a criminal, may summon citizens as the "posse comitatus" to aid him. Although the police duties of sheriffs are chiefly related to the enforcement of state laws, their jurisdiction is usually limited to their own counties.

The sheriff and his deputies ordinarily receive fees for the serving of writs and the execution of court orders. In some counties the sheriff is compensated entirely by a salary, however, and in others the fees are retained and supplemented by a salary or by a grant from the county board. As custodian of the jail, the sheriff frequently supplies food to the inmates, receiving a fixed amount from the county for each prisoner. Unfortunately, in too many instances the fare has been of such quality as to leave the sheriff or his deputy under the suspicion of making an inordinate profit on the transaction. An unpleasant phase of the sheriff's duties is to act as county hangman.

Other Officers

Most counties also have an elected prosecuting attorney, but in some states this official is chosen from a special district embracing several counties. The duties of this officer have been discussed elsewhere.2 Other officers are a coroner,3 justices of the peace,* and constables.5 The clerk of the county judicial court or of the sessions of the circuit court for the county may be an officer of some importance, especially in counties where in addition to his court duties, he acts as secretary to the county board. Special courts, such as probate courts, usually have clerks of their own. The organization of the state court system has been discussed elsewhere. 6 Some states have a special court for each county, but most have a circuit or district court for several counties which meets periodically in each county. In a state such as Tennessee, in which the justices of the peace meet for judicial and administrative business as a county court, the circuit court, meeting periodically in the county, constitutes the court of original jurisdiction in which most cases are tried. Justices of the peace are found in all states. A county treasurer, under various names, exists in all states except Rhode Island. Sometimes he acts as tax collector, or there may be a separate collector. Tax

² See p 369.

² See p 371

^a See p 353.

⁵ See p 370.

⁶See p 352.

assessments are made by county or township tax assessors, but their decisions sometimes are subject to review by state equalization boards. Special county clerks in some states, registers of deeds, superintendents of schools, and county surveyors are other common officials. All these officers, judicial and administrative, are elected, usually for short terms of one to four years.

The New England Town

The governmental organization of the New England towns is distinctive. There, the basic organ of local government is the annual town meeting of all the voters. At this meeting, presided over by the town clerk, the policies and details of administration are passed upon. Traffic and other ordinances are passed, and the building of schools, libraries, and waterworks is authorized. Money is appropriated for the carrying out of these projects, the conduct of the various departments, poor relief, health administration, the maintenance of roads, cemeteries, and playgrounds, and for other town activities. The town meeting also levies the taxes to meet expenses.

This assembly also chooses the town officers, usually for a one-year term. The selectmen, constituting a board of three or more officers, exercise administrative control between town meetings. There is also a town clerk, who, next to the board of selectmen, is the most important town official. Poor relief is under the administration of the board of selectmen or of a special board of overseers of the poor. Treasurers, assessors, constables, and justices of the peace are common officials. Schools are controlled by a school board. The towns also have a host of minor offices, mostly without remuneration, which at one time had significance but now have little importance. The office of fence viewer or field driver may have involved duties in the past, but now is sought for the dignity of office alone. Nearly all of these officers and boards are chosen by the town meeting, for the board of selectmen has little appointing power.

The town meeting has been extolled as the most democratic of all American institutions. In a very large measure it deserves this praise. It is a forum in which every voter can express him-

self upon local public questions and can make his influence felt. It is an excellent training ground for public debate. At the same time, it should be noted that when the country was more sparsely settled and the town meeting was the most active, the voting privilege was restricted to a comparatively few property holders, and in the Colonial period was even limited to the members of the right church. It was more of an aristocratic than a democratic body. Moreover, at the present time the town meeting has lost in importance or disappeared, especially in the larger towns. The town hall cannot accommodate all the voters, and many do not care to attend the meetings, especially after the election of officers is completed. The character of the inhabitants also has changed. Foreign immigration has brought in a large class of people to whom the old traditions of the town meeting has no meaning. The town meeting retains its virility most in the rural areas, but even here it is losing ground with the increase in population and the influx of alien concepts.

The county exists in New England, but it has small importance either as a judicial or administrative unit. Its duties are largely absorbed by the town. County boards do exist in most of the New England states, but their duties are limited and their appropriations small. In some instances county finances are carried by the state legislature.

The Township

The township exists as a unit of local government in the north-eastern and north central states, having been brought there by settlers from New England. In some of these states town meetings are provided for. Administrative officers include a township board and in some states a township supervisor, who is the chief administrative officer. The organization of townships varies greatly, but officers and boards similar to those of counties are found. The chief difference between the New England town and these townships lies in the reduced importance of the townships and in the fact that they function rather as subdivisions of the county than as local governing bodies. They are New England towns in a quite attenuated form and largely agencies through which the county carries on its work. The amount of purely lo-

cal business which they conduct uncontrolled by the county authorities is small. Nevertheless, the townships of the north central states are the most active county subdivisions in the country.

County Subdivisions

In Southern and Western states, county subdivisions go by such names as "civil district," "magisterial district," "militia district," and "precinct." The old English "hundred" survives in Delaware. Such districts serve for the election of a justice of the peace, a constable, sometimes a member of the county board, and a few other officers.

Special Districts

Special districts, such as drainage districts, are usually under a board. Generally this board is elected, but sometimes it is chosen by the county board or other authority. When not controlled by county authorities, such districts serve to reduce the jurisdiction of the counties and townships. Villages and organized towns, usually governed and administered by small elective boards, are growing in number. Like the special districts, they tend to cut into the jurisdiction of township and even of county authorities. All of these local areas of government, however, are losing to the growing agencies of the central state government, particularly in the fields of education, health, poor relief, and road building and maintenance.⁷

Characteristics of Counties

The size and population of counties varies greatly. There are over 3,000 counties in the United States, varying from around twenty square miles to more than twenty thousand square miles. Population varies between less than a thousand up to over three million in an urban county. A rather usual size for a county is about five hundred square miles, with a population of around twenty thousand. The largest areas and the smallest populations are found in the West. There are many small counties in the

⁷ See pp. 667, 732, 743.

Southern states. Originally there was some justification for the small county of sufficiently restricted area that the county seat could be conveniently visited by a man on horseback in a single day. With improved means of communication there is less justification for the small county, and in at least two states, Tennessee and New York, consideration is being given to plans for the consolidation of counties into larger units.

It will be noted that while most counties are rural, there are many which contain large towns, and in some instances the counties are really urban areas. Cook County in Illinois is almost coterminous with the city of Chicago, and New York City contains five counties. Any large city is likely to dominate the population of the county in which it is located. Where this condition exists, there is a great deal of duplication of functions between the city and the county governments. A remedy consists in the consolidation of the county and city governments into one system, or in the separation of the city from the rural parts of the county and its erection into a separate county. Where the urban population is not sufficiently large to justify consolidation or separation, the county and city governments must be retained, with such adjustment between their relations as seem best in each case.

Administration

Certain features of rural local government stand out in this brief survey. In the first place, it is evident that the work of local governing bodies is largely of an administrative nature. In the second place, even the administrative functions are limited, and much of the work of local government is supervised by, or even conducted by, state officials. A third feature is the fact that the functions they perform are not so much the product of peculiarly local needs as parts of a larger state problem. In a sense, such a function as poor relief may be regarded as a local problem, but on the other hand, it may be regarded as a state problem which has historically been met through local agencies. A fourth feature is the large number of elective officials, chosen for short terms. It should be added that the "merit system" of appointment has taken practically no hold in our local rural gov-

ernments. In the fifth place, local government shows an almost complete absence of a county head, corresponding to the mayor of a city. Finally, it should be noted that there is little uniformity in our systems of local government. New governmental areas have been created where there was a demand and seemingly a need, and functional boards have been set up, cutting across county lines when it seemed necessary. Local government, therefore, does not present an orderly pattern. This does not necessarily constitute a defect, however, except to those minds that are not satisfied by any system that cannot easily be charted on a blueprint.

Our county governments, however, are not well administered. The elective system has been carried to unnecessary extremes. This is not a good means of choosing administrative officers. Short terms are not conducive to the development of expert administrators. There has been a great deal of duplication in the establishment of offices. Too much of the time of officeholders is taken up in preparing for re-election. The fee system of compensation has provided sometimes inadequate and sometimes unnecessarily large returns. The administration of jails and poorhouses has encouraged graft and the neglect of inmates. It is not surprising that state authorities are taking over the administration of a number of local activities.

The English Plan

Compared with our own varying systems of rural local government, the English and French plans show a large degree of uniformity. English counties are of two kinds. First, there are the old historic divisions that are not now actual units of local government. Their chief function now is to serve as the basis for parliamentary elections and, for certain purposes, as judicial districts. For the purpose of local government their place has been taken by a new system of administrative counties into which the country is divided. The governmental organization of these English counties substantially reproduces that of the English cities, with a unicameral chamber of councillors, aldermen, and a chairman. The councillors are elected for a three-year term, the al-

dermen are chosen by the councillors for a six-year term, and the chairman, who corresponds to the mayor of a city, is chosen by the aldermen and councillors. The council functions through committees, which are aided by permanent nonpolitical officials, as in the cities. Its jurisdiction covers major roads, schools, and some other matters.

In England the counties contain rural districts, urban districts, and boroughs. Each rural district has its council, with jurisdiction over minor roads, problems of health, and some other matters. An urban district is an urban area that has not been given a charter. Nevertheless, it has its own council and its functions are broader than those of a rural district.

The problem of the large city within a county is solved in England by the simple process of erecting the urban area into a county as soon as it reaches a population of around 50,000. American states seldom confer the powers of a county upon a city.

The French Plan

French local government is severely under the control of the central authorities. France is divided into eighty-nine departments and each of these is administered by a prefect, who is appointed by the President of France and controlled by the central administration. There is an elected council for each department, but it can consider only those matters that the prefect sees fit to refer to it. Its legislative work is largely concerned with minor matters, but it does have the important power of passing upon the budget submitted by the prefect, and its members are included in the electoral college of the department, which elects senators to the national parliament. However, the dominant figure in the department is the prefect, who carries out the orders and enforces the regulations of the central authorities, enforces the national laws, issues his own decrees, exercises extensive powers over municipalities, and controls the administrative work of the department. The departments are divided into arrondissements, each under a subprefect, who is simply the local representative of the prefect and carries out his orders. There is a council for the arrondissements, but it has very little to do, except that its members are part of the electoral college for choosing senators to the central parliament. France cannot be said to contain any areas that correspond either to our states or to our counties, for the government of its subdivisions is merely a part of the central administration. The system does provide expert administration, however, for the prefects are men of experience and administrative capacity. Unfortunately, however, it cannot be said that they are nonpolitical, for to a considerable extent they engage in partisan politics in the interest of national factions.

Efficiency and Local Autonomy

There is little doubt that both British counties and French departments are better administered than American counties. It is not likely that the American people would submit the control of their purely local affairs to an administrator such as a prefect, even though convinced of the economy and efficiency of such a plan. It would be entirely alien to our traditions. The British, however, have attained a very considerable degree of efficiency while retaining a large measure of local autonomy. Careful observers are agreed that local government is the weakest link in American governmental organization. British experience has shown that it is possible to bring about improvement without a complete sacrifice of local autonomy.

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CHAPTER XXII

Political Parties

The Chief Function of Parties

A study of the structure of government, the way the offices are grouped and the powers attached to them, by no means gives a complete picture of any system of government, for government is an instrument of action and can be understood only as such. We pride ourselves upon the fact that ours is a government of laws and not of men. Yet no system of laws can operate without the motivating force of men. A democratic constitution is not in itself sufficient to provide good government. The kind of government that is actually afforded will depend upon the character, energy, and views of living men who enact the laws and determine policies.

In our system the motive force that puts all the governmental machinery into action is the political party. It is the political party that puts forward candidates for the various elective offices and that provides a set of principles upon which the men who compose the party are in general agreement. This then is the primary function of a modern political party—to stand ready with a program of action for the solution of the problems facing the governmental unit in which the party exists, and to offer a slate of candidates for office with a view to carrying that program into effect. Imperfectly as this may be done in practice by existing parties, no effective substitute by which democracy can be made to function has yet been devised.

The Two-Party System

The English-speaking countries have tended toward an alignment in which there are only two major parties. There are occasional departures from this, and even in Great Britain there have

been three major parties in recent years, although in general the British system contemplates only two. On the other hand, the continental democracies have developed a multiparty system in which parties grow up around individual leaders, or around programs of so specific a nature that they are acceptable to only a portion of the electorate. With such a system, the legislative body usually contains so many parties that no single one controls a majority of the votes. Majorities are obtained by coalitions among these groups and the coalitions are prone to fall apart. Thus, stability in government is impaired. It is interesting to note that it is particularly in countries with multiparty systems that the modern dictarorships, based on a single-party system, have grown up.

Where a two-party system exists, each party presents a program that is the result of compromises among its membership. It calls for a degree of flexibility by which individuals or groups, holding in general to a broad program of action, compromise upon details and thus present a united front upon essentials.

The endurance of political parties in the United States has been a striking phenomenon. Repeatedly one or the other of the great parties has been defeated at the polls so decisively as to raise doubts upon its ability to survive, and yet after such a defeat the party may in a few years return as strong as ever. One reason for this power of survival is the fact that there has always been a nucleus of members of the defeated party left in local offices. These officeholders are active party men and form a substantial base upon which the rebuilding process can begin. Another reason is the fact that, after all, the parties have not been far apart in their opinions. The defeat of a party does not represent a social revolution in which a new order has been substituted for the old. Specific issues are in dispute rather than fundamental principles. At the most there has been a change in emphasis among principles. Under these circumstances the supremacy of the predominant party is unstable. There has been much complaint that the parties in this country have not represented policies that were radically different, that elections were sham battles which would lead to much the same result whether one party or the other should win. In reality this may be a reason for gratification. When a deep cleavage in opinions among the electorate occurs, when the country is divided between radicals on the one side and conservatives on the other, parties arise to represent these opinions. When parties are not far apart, we can feel reasonably certain that the country is in the main united upon fundamentals. We may not like the artificiality in sham battles, but sham battles at least are much better than bloody revolutions.

The two-party system seems to function particularly well in maintaining this unity of opinion. Where there are only two opposing parties, each is on the alert for changes in public opinion. If a third party is formed and seems to be growing strong, the major parties are very likely, little by little, to adopt its policies. This is what happened to the Prohibition party, which faded out when the major parties took over its only issue. More remarkably it is what happened to the Populist party, which came with a program involving a number of major reforms. The Populist party itself was defeated. The Populist movement disappeared, and "Dead as Populism" became a phrase. But the Populist proposals of a graduated income tax, postal savings banks, the direct election of Senators, woman suffrage, and restricted immigration have been enacted into law, and a number of other measures in its program have been partially carried out. Some of its proposals, particularly those upon the currency, failed of eventual enactment, but in large part the Populist party disappeared because the major parties stole the planks in its platform. In this way the two-party system perpetuates itself and the major parties keep abreast of public opinion, thus preventing those cleavages that occur in less well-developed systems.

It is true that in this country we have seen the disappearance of at least two major parties. This disappearance has been followed shortly in each case, however, by a new alignment upon new issues, based upon a two-party system. The Federalist-Republican rivalry was followed by an alignment of Democrats against Whigs. The disappearance of the Whigs was merely a preparation for the modern Democratic-Republican alignment. It is true that for a while after the Federalists had passed from the scene there was an "Era of Good Feeling," or rather an era

of particularly bad feeling, based on personal rivalries, when the two-party system was in abeyance and something more nearly approaching the factional or multiparty plan was in effect. It is also true that during the Civil War the North was dominated by the Union party of Republicans and war Democrats, and during the World War "politics was adjourned" in the sense that the Republican party offered no resistance to the prosecution of the war. Something of this nature took place during the emergency period in the early part of the administration of Franklin D. Roosevelt. On the whole, however, lapses in the two-party alignment have been few and during by far the greater part of our history there have been two parties in active conflict. Minor parties have been numerous, but usually have been temporary, although the Republican party, originating as a minor party, eventually supplanted the Whigs as one of the major parties. Others that have enjoyed national prominence have been the Liberty party and the Free Soil party of the middle period, the Greenback party and the Populist party of the latter part of the 1800's, and the Prohibition party, the Socialist party, and the Progressive "Bull-Moose" party of the first part of the present century. Many other groups, some of which have gone into history under such names as "Know-Nothings" and "Mugwumps," have been formed around particular issues or have represented disaffected factions of major parties. Often they have flourished for a few years, but they passed out of the picture as the issues that created them disappeared, and their followers returned to their old allegiances.

Sentimental attachment to the old parties is a powerful deterrent to new alignments. The South is attached to the Democratic name and has followed it both when states rights supposedly was its great issue and when the New Deal was obliterating state lines.

A successful party under our system must not only win in national elections; it must also fill the state and local offices with its adherents. The mere size of the country tends to make it difficult for minor parties, for it requires a vast and expensive party organization to carry on contests for so many offices over

such a large area. In recent years, state laws have imposed new difficulties, for in order to secure recognition on the ballot, a party that has not cast a vote of a certain proportion in the preceding election may be required to present a petition signed by a percentage of the voters or by some fixed number. In Ohio, a requirement of 200,000 names has been effective in discouraging third party movements, and while this is an exceptional figure, a requirement of several thousand is not uncommon.

Effective Government Under the Separation of Powers

Parties in the United States perform a special function that accounts to a large extent for their exceptional strength. Although we do not have "party government" as carried on under the cabinet system, our great parties have an equally prominent place in our plan. The American governments, federal and state, and to a considerable extent even the local governments, are based upon the idea of a separation of powers, legislative, executive, and judicial. Yet it is impossible to have effective government unless the legislature and the executive work together, especially when to the separation of powers there is added the system of checks and balances. Acts of a state legislature usually need the governor's approval, and failure to carry them into effect cannot be punished except by impeachment. For practical purposes the legislature and the governor must cooperate, despite a legal system that assumes that they must be kept apart. The political party performs the function of bringing about unity of action. If the legislature and the governor are of the same party, they are likely to enjoy a degree of cooperation through their adherence to common principles. Moreover, since both the governor and members of the legislature probably desire re-election or perhaps appointment to other office, they are largely dependent upon the party leaders for continued support. They must accept this leadership if they are to expect other favors. Thus, the party provides the unifying influence in a constitutional system that is based on the separation of two departments that in practice must work together.

The Opposition Party

Even when not in power, a party has useful functions to perform. It stands ready with its policies and a slate of candidates to take over the government at the behest of the voters. It is something of an educational agency, instructing the voters in the virtues of its own policies and the defects of those of the party in power. In addition, it performs the very useful function of watching the dominant party, ever ready to pounce upon it for its mistakes, and presumably on the alert for evidences of mismanagement and corruption. Without an opposition, the party in power would become careless, but a watchful opposition holds it to its duty. When, from time to time, opposition has become dormant, administration parties have lost their vital spark. In Great Britain the importance of an opposition has become so well recognized that "His Majesty's Opposition" enjoys an accepted status along with "His Majesty's Government." In our own-Congress the opposition receives recognition through the fact that the minority party always is represented on the committees, and while it has only a minority of places in each committee, that minority is a substantial one. The number of minority seats has little reference to the size of the minority vote in the Congress. Rather, a fixed number goes to the minority simply because it is the minority. The small Republican group in the House of Representatives in 1937 had places on committees far out of proportion to their numbers in the House.

The National Basis of Parties

The national parties in the United States are organized on a quite uniform plan. They are truly national parties, for while they use state lines as a convenience in organization and operation, they function as national bodies, each putting forth candidates for federal, state, and local offices and supporting them as a unit. There has been complaint that we do not have state parties and local parties, formed to meet state and local issues, for the present arrangement tends to confuse national, state, and local issues. It is ridiculous that a man should be elected justice of the peace because his views upon national issues have led him

to be a Republican, for his duties will have no relationship to these issues. However, parties feed upon offices. The national parties need local workers, for their voters must be brought out in the local precincts. Thus, they are vitally interested in having their own adherents chosen to offices in the state and local governments. In the cities there is some tendency to break away from national control and to vote upon local candidates on the basis of local issues, but on the whole, even in the cities, national and local issues tend to become confused by allegiances to the national parties.

Nominations

The first problem of the party is to put forth candidates for all these offices. In our early history, nominations were made by a "caucus" of leaders. A caucus might be held for national, state, or local offices. A caucus might be an unofficial meeting of leaders in each locality who had sufficient influence to control groups of adherents. Eventually this was regularized through a "legislative caucus" of leaders of the party in Congress, which put forward candidates for the Presidency and Vice-Presidency of the United States. In the state legislatures the caucus put forward candidates for offices in the states. One weakness of the legislative caucus was that it was unrepresentative. Each district sent to the legislature only one representative, and the members of the opposing party in a district would not be represented in their party's caucus. This gave rise to the "mixed caucus," to which such districts were permitted to send a special delegate. Thus, each district was represented in each caucus by either a member of the legislature or a special delegate.

The legislative caucus came into disrepute, however, partly because of the wirepulling and even corruption that it encouraged, partly because it was felt that the members of the legislature were chosen for legislative rather than for nominating purposes. Andrew Jackson led the opposition to "King caucus," and a system of nomination by conventions took its place.

Under the convention system the members of a party chose representatives specifically for the purpose of putting forward candidates and setting forth that party's position upon issues.

The voters met in primaries or local party elections and chose members to a convention for a local area, such as the county, city, or perhaps Congressional district. These conventions put forward candidates for local offices and chose delegates to a state convention which put forward candidates for state offices. There might be an intermediate step of district conventions, making a series of three, or there might be other variations. The state convention in turn chose delegates to the national convention, which chose candidates for the Presidency and Vice-Presidency and adopted a set of party principles and opinions upon issues, known as the party platform.

Later, the convention system in turn came into some disrepute. In a large number of states it has now been replaced by a "direct primary" system under which the voters in their party primaries choose candidates directly for local, district, and state offices. The national convention has not been abolished. It would be difficult to choose a Presidential candidate by direct primary and next to impossible to prepare a platform. The direct primary is used in many states, however, as a means of selecting delegates to the national convention.

There are two forms of direct primary. The "closed primary" is one to which are admitted only members of the party holding the primary. Various means of determining party affiliations are used. In a simple form anyone may vote in the primary provided he is not challenged. If challenged, he may be required to qualify by making a declaration of party affiliation. This may take the form either of past affiliation, as that the voter supported a majority of the candidates of that party at the preceding general election, or a statement of his present intent to support a majority of its candidates. Such statements are final, since with secret voting neither his statement of past affiliation can be disproved nor his statement of present intention checked when his vote is finally cast.

In the "open primary," the voter is given ballots of all parties, no questions are asked concerning his affiliation, and he votes in secrecy upon the ballot of the party of his choice.

The chief objection to the closed primary is that the voter must disclose his party preferences. When the test of past affiliation is used, reasonable and honest changes from one party to the other are discouraged. On the other hand, the open primary is subject to "raids." For instance, a member of one party, knowing that the results in his own party are not in doubt, may prefer to vote in the primaries of the opposing party so as to insure the nomination of candidates preferable to himself. For this reason, the closed primary is used in most of the states.

Under either form of direct primary candidates have their names placed on the ballot by filing with the appropriate officials a petition, signed by a fixed number of voters or by voters constituting a certain percentage of the party vote at the preceding general election.

The direct primary is subject to the serious drawback that it permits no compromises. The man with a plurality of votes is nominated even though his plurality is far short of a majority. He might be violently disliked by the rest of the voters. A convention might solve this difficulty by choosing a man who, though not the first choice of even the largest group, might be reasonably acceptable to all. A variation on the simple direct primary is the run-off primary used in some of the Southern states. These states attempt to solve the problem of the plurality candidate by providing that if no candidate has a clear majority, then the highest two must compete in a run-off primary Thus, the party voters are not compelled to accept the man who had a plurality in the first election, but have the alternative of the second highest. Some such provision particularly is needed in Southern states, where the Democratic nomination is equivalent to election. Nonpartisan primaries apply a similar principle.

Most of the states provide for "nonpartisan primaries" for certain offices. These may be judicial offices, school offices, and the like, where partisanship presumably has no place. In this type of primary the names of all the candidates for the office are carried without any designation of party. Each voter marks his choice, and the two candidates receiving the highest number of votes are then entered in the election. The system encourages independent voting, although it by no means insures that voters will not be influenced by party considerations.

In our early history the method to be followed by a political

party in selecting its candidates was considered purely a matter of party concern. Now it is recognized that the nominating process may be just as important as the final election. In some states the nominations of the Democratic party are, in practical effect, the election. As a result, the party nominating machinery is regulated in large part by law. Where the direct primary is required, the whole process is determined by statute. The Supreme Court has taken the position that party primaries are not subject to federal control, but in the states the party organization and methods have come to be regarded as part of the whole machinery of government and subject to state control.

THE NATIONAL CONVENTION

Composition of the Convention

The most dramatic of all the activities of a political party is its national convention, where candidates for the Presidency and Vice-Presidency are chosen and the party platform is adopted.

Preparation for the convention usually begins in the preceding December or January, when the National Committee of the party determines upon a city in which the convention shall meet and fixes the date for its opening. Ordinarily a centrally located city is preferable and it must be able to supply a large hall for the meeting. In recent years cities have competed for the privilege, and delegations of citizens have offered large sums toward expenses as an inducement. The date for the convention usually is set for June or July. The Republicans nearly always meet in advance of the Democrats. Probably this gives some advantage to the Democrats, since they can adjust their own course after the Republicans have taken a stand from which they cannot retreat.

At present, the Democrats allow to each state two delegates for each Senator and Representative in Congress, and in addition six each from Alaska, Hawaii, the Philippines, Puerto Rico, the Canal Zone, and the District of Columbia, and two from the Virgin Islands. However, at the national convention of 1936, the Na-

¹ See p 86.

tional Committee was instructed to report to the next convention a new rule of apportionment that would take into account the Democratic voting strength in each state. It is expected that the new plan will be similar to the present Republican system of apportionment.

Formerly, the Republicans allowed two delegates for each Senator and Representative, and others from the territories and the District of Columbia. This rule was subject to certain objections. The Republican party has practically no following in the South. As a result, the representation of a Southern state on the basis of its representation in Congress gives to a handful of Republican voters in that state an undue influence in the convention. They have as many delegates as a Northern or Western state of the same population which may be preponderantly Republican. Another objection lay in the character of some of the Southern delegates. The few Republicans in a number of these states are likely to be postmasters and their relatives and friends. It is they who choose the delegates. Since the postmasters are appointees of the administration, a Republican President could control the large block of Southern delegates and use them to bring about his own renomination or unduly influence the nomination of another candidate.

As a result of these objections, the Republicans have reduced the Southern representation. Delegates to the Republican convention now are admitted on the following basis: two for each Senator; two for each Representative-at-large; one for each Congressional district; three for each state casting a majority of its electoral vote for the Republican Presidential nominee at the preceding election; one additional for each Congressional district casting 10,000 Republican votes at the preceding Presidential or Congressional election; and two each for Alaska, the Philippines, Puerto Rico, Hawaii, and the District of Columbia. The effect is to reduce the Southern representation, but by no means to reduce it in proportion to its Republican vote.

Both parties allow one alternate for each delegate. There are something over eleven hundred delegates and eleven hundred alternates in each convention. It will be noted that the political parties permit representation to the territories, which cast no vote in national elections, and even to the District of Columbia, which has no suffrage at all.

The Choice of Delegates

In both parties the delegates are chosen in primaries or by conventions in the states. A common plan provides that the delegates from Congressional districts be chosen in conventions or primaries in the districts, and the four delegates representing the Senators be chosen from the state at large. Where three additional delegates are awarded to states which chose Republican electors at the preceding election, these also are chosen at large. Sometimes a state which wants to send a large number of party leaders to the Convention will choose at large more than it is entitled to. In this case each member will cast only a fractional vote, determined by dividing the number of votes at large to which the delegation is entitled by the number of delegates-at-large actually chosen.

Sometimes delegates are chosen on a pledge to support a particular candidate for the Presidency. In a few states the voters in the primaries may express their preference for the Presidency on a ballot separate from the one on which they vote for delegates. The extent to which delegates are bound by pledges or Presidential preference votes is doubtful. Strictly, they are not bound at all, but usually they interpret their obligation as requiring at least a complimentary vote on the first ballot to the preference candidate, or they may hold themselves bound to vote for him as long as he has a reasonable chance to be chosen, or they may hold that they must continue to vote for him to the bitter end. A severe interpretation by many delegates would hamper the work of the convention, for parties can function only through the compromise process of give and take.

The Convention Scene

The national convention meets in a large hall. On the floor are the delegates and alternates. The press and the radio have space assigned to them. Radio listeners over the country hear the convention proceedings more clearly than do the delegates themselves. The newspapers carry daily accounts of the work of the convention and special writers discuss the issues and give "behind the scenes" accounts of events. The galleries are packed with visitors who are by no means silent spectators. The manner in which the great parties in America go about the task of selecting candidates, one of whom will occupy the highest office in the land, has been a source of wonder to foreign visitors, for tumult and disorder appear to be important elements in the process. The convention takes place in the heat of summer, and the milling crowds on the floor and the cramped spectators are uncomfortable in the swelter.

Organization

At the time set for opening, the convention is called to order by the chairman of the National Committee, who acts as presiding officer until the temporary chairman of the convention has been chosen. A clergyman from one of the churches of the city offers the opening prayer. The call for the convention, issued by the National Committee, is then read by the secretary of the National Committee. The national chairman makes a short speech and the temporary chairman and other temporary officers of the convention are then elected. Usually the nominee of the National Committee for temporary chairman is chosen, but when the convention is divided between opposing forces, an opposition candidate may be put forward and the contest utilized as a test of strength between the factions. The chief function of the temporary chairman is to make a "keynote" speech, which is supposed to set the keynote of the coming campaign. However, this speech may well be eclipsed by other speeches at the convention.

The next business is the choice of the four great committees of the convention—the committee on credentials, the committee on permanent organization, the committee on rules and order of business, and the committee on platform and resolutions. One member from each state and territorial delegation serves on each committee. It will be noted that there is no committee on nominations.

Often there are at the convention two sets of delegates from states or districts, each claiming to be the legally chosen delegation. The committee on credentials must bring in recommendations upon such contests. The convention may accept or reject these recommendations. In 1912, at Chicago, the chief contestants for the Republican nomination were President William Howard Taft and Theodore Roosevelt. There were contesting delegations sufficient to determine the control of the convention. The National Committee, supporting Mr. Taft, had drawn up a temporary roll seating the Taft delegates. Since those on the temporary roll vote until the committee on credentials has been chosen and its recommendations acted upon, these delegates voted in the choice of members of the committee on credentials. The committee on credentials reported favorably on the Taft delegates, and the convention, the members on the temporary roll voting, adopted the recommendations of the committee. Ordinarily, the committee on credentials has a much less dramatic role to perform. Since harmony within the ranks is of such great importance to a political party, the committee on credentials may even recommend, where the rights are not clear in a contest, that both delegations be seated, each contestant having a half vote.

The committee on rules usually reports the rules of the preceding convention.

The committee on permanent organization recommends a slate of permanent officers, including a permanent chairman. Usually it recommends that another person than the temporary chairman be made permanent chairman.

The most important work of the committee on platform and resolutions is to frame a platform or set of policies which the party is to offer as a solution for the problems of the country. Sometimes it reports before the candidates for President and Vice-President have been chosen. Sometimes it waits until the candidates have been chosen. If the platform is adopted first, presumably the emphasis is to be on policies, and candidates favorable to them will be chosen. If the candidates are chosen first, they may be committed upon the platform. However, a candidate may repudiate part of the platform.

The Platform

Party platforms presumably state the position of the parties upon important issues before the country. Too often they are marvelous revelations in evasion, replete with platitudes and ambiguities, capable of any sort of interpretation. The platform is intended to attract as many, and to alienate as few, voters as possible. On the other hand, upon burning issues a party may do well to take a positive stand. The Whig party went out of existence when it tried to straddle the slavery issue.

Concerning matters upon which the country is united, the platform will come out with a great show of courage and boldness. Certain things may be depended upon. Each party appeals to the shades of its departed heroes. The Democrats may mention Jefferson, Jackson, and Woodrow Wilson. The Republicans may refer to Lincoln and Theodore Roosevelt. Each attacks the other for failure to grasp the true significance of national problems and for the inadequate nature of its program. They "point with pride" to their own achievements and "view with alarm" the policies of their opponents. The party in power gives a glowing account of its record and promises an even brighter future, provided the country is fortunate enough to continue it in office for the next four years. The party that is out of power laments the condition of the country which has shown such retrogression under its present administration. However, there is one ray of hope. There are distinct signs that the people are ready for a change. The "outs" stand ready at the behest of the people to step into the breach.

Platforms are not always entirely innocuous, however. Often there is fierce controversy over particular "planks" or statements of policy on issues. In the Democratic convention of 1924, when the chief contestants were Alfred E. Smith and William G. McAdoo, feeling was strong upon the question of denouncing the Ku Klux Klan by name. This anti-Catholic organization was strong in the South, and the Catholic Northern wing, unwilling to compromise upon a general condemnation of such organizations, wanted a plank which would specifically condemn the Ku Klux Klan. The committee on platform was

closeted for hours, unable to formulate a statement satisfactory to all. William Jennings Bryan led the committee in prayer. The fight was carried to the floor of the convention. Mr. Bryan attempted to address the crowd, but they howled him down. It was a dramatic moment. Bryan several times had been the Presidential candidate of the party and since 1896 had been an important factor in every convention. He was the leading orator of his party, and if he had been able to secure the ear of his audience, he might have carried it with him. The galleries, however, were packed with Catholic supporters of Mr. Smith, demanding a strong anti-Ku Klux Klan plank, and every attempt of Bryan to begin was drowned in the cries of the crowd. The cleavage in this convention was so deep that although the party had begun the year with great hopes of success, it was decisively defeated at the polls.

Choosing the Candidate

It is not upon the platform, however, that the greatest struggle takes place. The important problem is in the choice of a candidate for the Presidency, and after this the choice of the candidate for the Vice-Presidency. In the Republican convention election is by a majority vote of the delegates, each delegate casting his vote individually. The Democrats, however, have been governed by two special rules upon nominations. The first of these is the "unit rule" and the second is the "two-thirds rule."

The unit rule is a product of Democratic emphasis upon the states as units of representation. This does not mean, however, that each state has one vote. Under the unit rule the number of votes from each state is determined by the number of delegates, but the entire vote of a delegation is cast with the majority of that delegation. If the state had fifty votes, and twenty-six of the delegates were for candidate A, and twenty-four for candidate B, then all fifty votes would be cast for candidate A. Unfortunately, under this system a candidate might obtain the nomination of the convention even though he were the actual choice of only a majority of the delegates in sufficient states to constitute a majority of the convention, while having no votes in the remaining states. His majority in the convention would be pad-

ded with the votes of persons who really desired candidate B. A would have a majority of the votes as cast under the rule, while B would be the choice of the delegates polled individually.

The unit rule is not compulsory, but it is binding upon a delegation where the state convention has instructed it to vote under the rule. Since 1912, even this rule as thus applied has been relaxed, so that now if a state law provides otherwise, even a state convention may not bind the delegation.

Balancing the "unit rule," another principle has been applied in Democratic conventions. This is the "two-thirds rule," under which a candidate must attain a two-thirds majority in the convention in order to secure the nomination. Usually, a candidate who reaches a simple majority has been given the two-thirds vote anyway, but the rule has been a constant source of danger to party harmony, especially since, with the relaxation of the unit rule, the votes as cast in the convention have tended to carry fewer votes from minority members of state delegations.

For years there was agitation for the abolition of the two-thirds rule. It was retained largely because of a peculiar situation in the Democratic party. That party consists of two wings which are divergent in many respects. The larger or Northern wing is urban, industrial, and inclined to measures in aid of working men. It includes a large Catholic element and a considerable proportion of recent immigrants and their children. The Southern wing is rural, agricultural, conservative, Protestant, and of families long established in this country. This Southern group is attached to the party by tradition and by the emotions generated by the Civil War and Reconstruction. No Presidential candidate from the Southern states is likely to be chosen, but the South can be depended upon in normal times to support the Democratic candidate. On the other hand, a man is needed to carry the Northern states. The South must content itself with securing the nomination of a Northern Democrat who will be the least objectionable to itself. The two-thirds rule was a potential weapon of protection in this respect, for the South could control enough votes to prevent the choice of an undesirable candidate.

Eventually, President Franklin D. Roosevelt brought the Nor-

thern wing of the Democratic party into control, and, at the convention of 1936, the two-thirds rule was abolished. However, this action was coupled with a resolution calling upon the National Committee to submit to the 1940 convention a new plan of apportionment which will take into account the Democratic vote in each state. It was expected that a plan somewhat similar to the Republican apportionment would be submitted. Such a plan would mitigate the effect upon the South of the abolition of the two-thirds rule. The unit rule was not changed.

Except for the differences in making the count, the nominating process is the same in both parties. The drama begins with the call of the states in alphabetical order. Each delegation as called may put forward a candidate for the Presidential nomination, or if it prefers, may yield to any other delegation farther down the list.

Nominating speeches generally follow a recognized technique. Without at first mentioning his name, the past history of the nominee is extolled, his personal and executive qualities are set forth in glowing terms, and eventually at the very last as a climax his name is given.

This technique is necessary in order to prepare the ground for a proper "demonstration." The mention of the candidate's name is the signal for a demonstration by his supporters in the convention. This must start with a burst of noise and continue for as long a period as possible, for the popularity of a candidate is presumably gauged by the volume and duration of the tumult in his favor. Those taking part in the demonstration march around the hall making as much noise as they can. Banners carrying pictures of the candidate may be released from the galleries and balloons dropped from the roof. A beautiful young lady may appear to lead the cheering and singing. As the demonstrators march, the band plays. In 1924, a New York band made the mistake of playing "Marching Through Georgia" while the Georgia delegates were participating in a demonstration, apparently believing that this music was especially dear to Georgians. In the case of a prominent candidate the demonstration may continue for an hour or more.

The synthetic enthusiasm of the demonstrators probably has

some effect, but back of all the noise the leaders of the party are reaching decisions for the convention. Much of the real work of the convention takes place in hotel rooms, where the men who can control states and blocks of delegates discuss strategy and bargain for votes. However, conventions are not likely to be controlled by a few bosses. The delegates listen to public opinion as well as to the leaders. Their votes are not in the hands of leaders to be traded at will. Nevertheless, there must be leadership if a decision is to be reached. Compromises are the order of the day. For this reason, conventions progress most harmoniously when the leading candidates do not visit the convention city. Formerly it was considered poor taste for prominent candidates to be present, but in recent years there have been violations of this rule.

Usually the nominating speeches are followed by seconding speeches on a separate roll call, but the two may proceed upon the same call.

The Qualities of a Good Candidate

What are the factors that make a good Presidential candidate? Personal qualities are important. Americans more than Europeans seem to attach importance to exemplary personal morals. The candidate should be a good family man. If he can be pictured with his wife and children grouped around the piano, each contributing his part to the family harmony, it helps a great deal. He should be a good public speaker. Unusual inflections and unorthodox pronunciations have been harmful to some candidates. Yet Mr. Coolidge's New England twang carried a touch of the soil that increased his hold upon a people that insists upon simplicity in its public servants. In recent years a charming radio voice has been a distinct asset.

A successful record in some public capacity, such as that of governor of a state, is an essential. The public anticipates future action according to past accomplishments.

It is a distinct asset for a candidate to have been born poor. He must be a man of the people. Recently we have had some wealthy Presidents, but Mr. Hoover had the good political for-

tune to have been born poor, and the two Roosevelts were able to overcome their wealthy background only by unusual activity in demonstrating an interest in the common man

The parties are not likely to pick a candidate from a small state or from a state that is certain to support one or the other party. The large, doubtful states supply most of the nominees. When an election is in doubt, a few large states may determine the result. A man who can bring one of these into the party column is distinctly available material.

Religion, unfortunately, has played a part in American elections. We have never had a Catholic President, and Alfred E. Smith, Democratic candidate in 1928, was hopelessly defeated in a campaign in which defections from his party, especially in the South, were due to the fact that he was a Catholic. For some time to come it is likely that Protestants, or at least non-Catholics, will be the candidates for the Presidency. Racial antagonisms also may be expected to limit the field of choice

We often say that any little natural-born American boy may become President. This is true. But his chances will be much improved if he comes from a large, doubtful state, if he belongs to the right church, and if he was born in a log cabin of poor, and undoubtedly deserving, parents. We have had women candidates for the Presidency, and that before there was national suffrage for women, but not as the representatives of any of the great parties. For the present, a little girl must content herself with the possibility that she may some day become the President's wife, a position apparently of no small political importance.

The Vice-Presidential Candidate

By the time the candidate of the party for the Presidency has been chosen, the delegates are ready to leave. The weather usually has been hot and anything that follows the climax of the Presidential nomination will seem tame. Moreover, delegates must pay their own expenses and by this time their hotel bills have begun to look formidable. Candidates for the Vice-Presidential nomination are put forward in the same way as those for the Presidency, but the convention has lost its fire. As quickly

as possible it chooses a "running mate" for the Presidential candidate. The nominee for the Vice-Presidency is likely to be a member of a defeated faction of the party or a political leader from some other section of the country. After this business is completed, the convention adopts a few routine resolutions and the members hurry back home.

Acceptance Speeches

Some time later, in an appropriate setting, the candidates are formally notified of their nomination. The Presidential candidate's speech of acceptance may be of greater importance than the party platform itself, for the candidate cannot so easily resort to the verbiage and evasions of that document. After the acceptance speeches have been delivered, the campaign is on.

THE SYSTEM OF COMMITTEES

The Permanent Staff

Conventions and primaries supply the more dramatic elements in party life. Back of them is the permanent staff of the party, which for the most part works in quiet, but is nevertheless the controlling force in all these activities. This permanent staff consists of a series of committees, extending from the National Committee down through the states and counties and into the voting precincts. The committees are composed of active party workers, upon whom rests the major part of the burden of carrying on the work of the party.

The National Committee

At the top is the National Committee, composed of one man and one woman from each state and territory. The members of the National Committee are chosen by the national convention of the party, which accepts, however, such members as may be nominated by the delegation from the state or territory, or by the state convention, or by the voters in primaries, depending upon the practice of each state. They serve until their successors are chosen at the next meeting of the national convention,

four years later. The chairman of the committee is in fact named by the new Presidential candidate of the party, for its first major function is to carry on the campaign for his election, and it is important that the candidate and the chairman shall work in harmony. The chairman need not even be a member of the committee.

The National Committee directs the campaign for the candidates chosen along with it at the National Convention, and in addition assists the party candidates for other offices, national, state, and local. Funds raised by it are in part passed down to state and local committees. It organizes a speakers' bureau, arranges for radio addresses, distributes pamphlets, and acts as the central directing body for the campaign. Between elections, its activity subsides, but effective work has been done during this period, particularly by the party out of office, in issuing statements concerning the policies of the administration. For this purpose the tendency is to employ newspaper men who understand the technique of such publicity. During the administration of President Hoover the opposition employed these tactics with telling effect.

The Congressional and Senatorial Committees

There are two other central party committees. They are the Congressional and Senatorial Campaign Committees for each party. These are composed of party members of each house of Congress. They assist members of the party in the Congressional and Senatorial contests, particularly in the "off years," that is, in years when there is no Presidential contest, and the National Committee is not so active as it is during Presidential campaigns.²

State and Local Committees

Below the National Committee are state committees for each state; and below these are district committees, county committees, and precinct committees. In the municipalities there may be city and ward committees. In fact, wherever there are offices

² See pp. 115, 116, 123.

to be filled, there must be party workers to see that no opportunities are lost. County committees are everywhere important because of the large number of elective county officers. The committees normally are chosen by the party voters, or by conventions, but may be in part appointive. There may be a single elective committeeman for each precinct or election district, the precinct committeemen within each ward or county composing the ward or county committee. On the other hand, there may be an elective ward committee that names a committeeman for each precinct, possibly from its own membership. There is no uniformity in this respect. Neither is there any definite control by the higher committees over those of lower status, although there is unity of action through the necessity of cooperating in the national campaign, and through the fact that a considerable part of the party funds are passed down from the National Committee.

Theoretically, the party organization rests upon a democratic basis, but the active leaders actually control the machinery and direct the party policies. The ordinary party members have so little time to give to politics that those who make it a business are likely to get what they want.

At the base of the whole organization is the precinct committee. This may consist of one or more than one person, but there is likely to be one member who is looked upon as the leader. The precinct committee is the one upon which the party depends to get out the vote at election time, and this calls for more than sporadic activity during campaigns. The precinct committee is active throughout the year. A good precinct committeeman makes himself friendly to everyone, attends all neighborhood meetings, knows all the voters by name, and prefers to be known as a good fellow. Usually, in the great city machines he helps in small personal matters. He may see that traffic "tickets" are torn up, or the violators released with a reprimand, for the judge himself may need party support at the next election. Always his influence may be sought in securing appointments in the public service and often it is helpful with public utility companies and even with other private employers. The party depends upon him for reports upon the state of opinion among the voters. Knowing the latter intimately, he is in a position to observe any changes that take place. The reports of all the precinct workers combined give the party leaders a picture of the state of public opinion that may be more accurate than any poll. The Chairman of the Democratic National Committee made a remarkably accurate prediction of the results of the election of 1936. This was not due to any occult powers of Mr. Farley. He had the reports of one of the most complete party organizations the country has known.

Bosses

The party organization in many cities often comes under the control of a man or group who manage it more or less independently of the party as a whole. Such an organization is known as a "machine." If it has a dominant leader, as is likely to be the case, he is a "boss" The group around him may divide the power and spoils among themselves and become a "ring." Such party machines are likely to be permeated with graft and corruption. City contracts are passed out to members of the ring, or those favored with contracts are required to pay for the privilege. Since cash payments may be illegal and dangerous, the money may pass hands through various subterfuges. For instance, the contractor may purchase advertising space in a newspaper or other publication issued by one of the members of the ring. The publication may have little circulation and be valueless for advertising purposes, but the contractor pays enormous rates for his space. Persons who oppose the machine may be subjected to all sorts of petty persecutions, visits from the city inspectors and from the police. On the other hand, law violators, persons who maintain disorderly houses, organizers of rackets, and all who should have reason to fear the police, may carry on their illegal activities at pleasure, provided always they pay their contribution into the coffers of the ring.

Machines show a remarkable ability to survive even in the face of a general recognition in the community of the bad government that goes with them. Occasionally such an organization is defeated, but it is likely to come back at the next election as strong as ever. This is due in part to the indifference of vot-

ers who may be aroused to a high pitch of indignation for a short period, but soon return to their usual passivity. Partly it is due to a fatalistic attitude in which the public takes for granted a bit of corruption among politicians. Also there is some lack of political sagacity among reform leaders after they come into power. The party bosses have a humanness about them that awakens warmth of feeling among voters, who are not easily held by the reformers' abstract principles of good government. Professional politicians are likely to be "good fellows" both by instinct and by design. It has often been observed that the political bosses have recognized what the reformers have not understood—the individual's desire to be treated as a human being rather than merely as a beneficiary of good government. Tammany, the great New York City organization, has been one of the greatest charity organizations of the city. In the wintertime when men were cold and out of work, it has given dinners to the poor, and in the heat of summer it has taken their children to Coney Island. What does it matter if the funds for this are only a fraction of what the organization has cost the city? Waste may increase taxes, but this appears to be a concern only of the wealthy. Savings are not necessarily passed on to the poor. That bad government may create more poverty and suffering can be proved only by a complicated process of reasoning, but the friendly local leader who performs kindly acts for his neighbors in times of need is a reality that needs no explanation.

The National Campaign

The parties conduct their campaigns for the whole party slate. The National Committee, in years in which a President and Vice-President are being chosen, issues a campaign textbook which contains the party platforms, the acceptance speeches of the chief candidates, and other general information. It constitutes a handy reference book for party speakers. A similar textbook is issued by the Congressional and Senatorial campaign committees in the off-year elections when there is no Presidential campaign. Speakers "stump" the country for the party candidates. Speeches of the candidates and party leaders are carried on the

radio. Throughout the country candidates for office carry on the local campaign by speeches, advertisements in newspapers, and placards. Torchlight processions and rallies once were common, but have lost in favor.

American political gatherings are often contrasted with the British. The British meetings are attended by members of even the opposing party, and heckling of speakers is not frowned upon. Questions are fired at the speakers from the audience, and, as a result, the British speakers must be on the alert to parry embarrassing questions. Their speeches have an informal character which is lacking in America. Our political gatherings are attended by only one party or, if others attend, heckling is out of order. Bands and bunting contribute to the emotional atmosphere Our meetings, therefore, tend to appeal to the heart rather than to the mind, and the speeches are directed to the accepted prejudices of the audience. The radio is bringing about a change in this respect, for the audience, scattered over the country in family groups, does not fully partake of the mass enthusiasm of the crowd and must be reached more by appeals to the intelligence.

Perhaps more important than all this are the personal appeals. The candidates for local office travel over the country, meeting every possible voter, shaking hands, and soliciting support. Sometimes the candidate leaves his card carrying his name and a personal slogan or brief statement of principles. When this is impossible, he may resort to the mails. Such personal appeals, where the candidate apparently has remembered even the name of the voter, are flattering and correspondingly effective. Moreover, back of all the speeches, swings around the country, and campaign publicity is the party organization, reaching down through the states and counties into the voting precincts. Here the regular army, as contrasted with the ephemeral militia, has been preparing the way, and during the campaign these organization workers become increasingly active. On the day of the election their labors become feverish. They furnish conveyance to the polls for those who need it, round up the indifferent, and convince the doubtful. If other means of persuasion are to be used, it is they who handle the funds. Without these workers in the precincts, all the speeches and agitation would be useless, for the voter is not moved by abstract issues alone. In the end it is personal persuasion that brings him to the only action that counts, a vote at the polls.

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CHAPTER XXIII

Elections

The Constitution and Elections

The federal Constitution is unique among the great constitutions of the world in that it leaves to the states, with certain restrictions, the determination of the qualifications of electors (that is, voters) for the national offices. The only restrictions laid upon the states are that the electors for Representatives and Senators shall have the qualifications of electors for the most numerous branch of the state legislature (Article I, Section 2; Seventeenth Amendment), and that the right of citizens to vote shall not be denied or abridged because of race, color, previous condition of servitude, or sex (Fifteenth and Nineteenth Amendments).

The Fourteenth Amendment also provides that the basis of representation for a state in the House of Representatives shall be reduced in the proportion that male citizens, twenty-one years of age, are denied the suffrage in elections to choose electors for President and Vice-President, and in elections for Representatives in Congress, state officers, or members of state legislatures, except where the denial of the suffrage is due to participation in rebellion or other crime. This provision is interesting in that it assumes that electors for the Presidential electoral college are to be chosen by the people, as has been the practice. It is also worth while to note that it applies only to male voters. However, this part of the Fourteenth Amendment has not in fact been enforced.¹

Suffrage Qualifications

Although the states are free to provide widely varying suffrage requirements so long as they keep within the Constitutional lim-

¹ See p 87.

itations referred to above, they do in fact maintain a remarkable degree of uniformity. Everywhere the voting age is set at twenty-one, and United States citizenship is required. Before the World War several states permitted persons who had taken out their first papers for citizenship to vote, but the attitude of many "hyphenated Americans" during the war gave an impetus toward the abolition of this very liberal provision. Residence within the state for a period is required, usually for a year, although some states have a shorter period and some require two years. This residence is a "legal residence," however. Under American laws one may dwell in one place and "reside" in another. Residence is largely a matter of intention, and where one intends to reside is his residence. However, the courts will not accept a mere statement of intention as final. They will insist upon some tangible evidence. For instance, one who was born in a state and lived there for a number of years, and who had left the state but nevertheless retained a homestead there which he occasionally visited, might be held to have furnished some tangible evidence of intention to retain his residence there. Each case must be decided by the court on its own merits. In addition to residence in the state, usually there is a requirement of a short residence in the locality in which the vote is cast.

During the Colonial period the ownership of property of a certain value was a common suffrage requirement. After the Revolution there was a tendency to substitute the payment of taxes for the property requirement, and under the influence of Jacksonian democracy even this lost in favor and universal manhood suffrage took its place. At present most of the Southern states require the payment of taxes as a prerequisite to the exercise of the suffrage, or require this as an alternative to an educational qualification, but as a matter of fact these provisions are enforced primarily against Negroes. Tennessee and Arkansas require the presentation of a poll tax receipt.

Most of the Southern states and a few Northern states have educational tests. The purpose of such tests as applied in the North is to exclude the unintelligent, and a minimum educational test such as the ability to read and write usually is taken as a measure. The Southern states apply their educational tests primarily as a means of disfranchising the Negro.

Insane persons, idiots, and persons convicted of felonies are customarily barred from the suffrage. A number of states exclude paupers and several exclude soldiers and sailors. Various minor offences, and particularly those in connection with elections, such as bribery, are grounds for exclusion in others.

In the Southern states various means have been used for the purpose of excluding Negroes from the suffrage. During the reconstruction period some of these states were under Negro domination. White rule was restored only by illegal methods, such as violence at the polls and intimidation through the Ku Klux Klan. After supremacy had been regained by the whites, they employed legal devices to retain control, but since the Fifteenth Amendment was an obstacle to direct methods, subterfuge was resorted to.

The educational test is the most convenient means for this purpose. The requirement that the voter be able to read and write is sufficient to bar many Negroes. Even more effective is the requirement that the voter be able to interpret the Constitution. Since white judges conduct the examination, they may ask of white persons only the most simple questions and accept the most obvious answers. A Negro, however, may be required to interpret the phrase "due process of law," and since this must be done to the satisfaction of white election judges, he is not likely to give an acceptable answer.

The requirement of a tax receipt is another qualification which bars many Negroes. The judges may-neglect to enforce this upon white voters. Sometimes presentation of the tax receipt is an alternative to the educational test. The judges may also ask many specific personal questions, and if a Negro should answer any one of these incorrectly, he may be held guilty of perjury and barred. Furthermore, disqualification for the suffrage may arise from conviction for a variety of minor offenses and this results in barring many Negroes.

Formerly, a number of Southern states had grandfather clauses and "old soldier" clauses which admitted persons to the suffrage, even though barred by educational or other qualifications, if their ancestors had voted prior to a certain date, as 1866, or if their

ancestors had served in the Civil War. A grandfather clause in the Oklahoma constitution applying to all descendants of persons who were entitled to vote in 1866 was held invalid by the Supreme Court as a violation of the Fifteenth Amendment, in Guinn v. United States This clause was permanent in nature, applying to all descendants. Other grandfather clauses were limited by their own terms, applying perhaps for only a few years. Probably they, too, would have been held invalid if they had reached the Supreme Court. No grandfather clauses or old soldier clauses are now in force. It will be observed that their immediate effect was not to bar Negroes but to include whites who would otherwise have been disfranchised. Their ultimate effect, however, was to serve as a part of the system of Negro exclusion.

The extent to which Negroes actually vote varies greatly in different sections. In the North Negroes are not subject to discrimination. In the border states of the South there is not a great deal of discrimination. In the deep South they are seldom permitted to vote. There is less discrimination in large cities than in rural areas.

The latest extension of the suffrage was embodied in the Nineteenth Amendment, extending the franchise to women. A number of states already had admitted women to the ballot when the amendment was adopted.

Opponents of woman suffrage argued that woman's place was in the home. They even predicted dire results to womanhood if women should participate in politics, and further argued that women would vote upon an emotional rather than a reasoned basis. Proponents of woman suffrage pointed out that under modern conditions matters formerly confined to the home had acquired a public nature. The family milk supply, for instance, was not obtained from the family cow but from dairies that required public regulation. Other public matters, such as schools, were of peculiar interest to women. The argument upon women's emotional judgments was flatly denied, and it was predicted not only that women would not be harmed by participation in elections but that they would actually purify politics. The act-

ual effects of woman suffrage are difficult to determine, but certainly it has neither fulfilled the gloomy predictions of its opponents nor the more enthusiastic hopes of its proponents.

Registration

In America the preparation of voters' lists is rendered difficult by the migratory nature of our population, which makes it difficult to maintain accurate lists of persons qualified to vote. European countries, with a more permanent population, have fewer changes to make from year to year. Moreover, in America there is no system of compulsory military service, such as that of France, with accurate service records which can be used as a basis for the preparation of voters' lists, nor do we have a police organization like that of Germany that knows the comings and goings of all the people and can easily verify statements concerning residence.

Formerly, voters' lists in this country were prepared by officers who attempted to compile them as an incident to their other duties. The lists were carelessly kept and carried the names of men who had moved to other jurisdictions, men who had died, and even those who had never existed. This did not make much difference in rural areas, for there each voter knew his neighbors by sight and name, and errors were easily corrected at the polls. In fact, registration may be entirely unnecessary in rural areas. But in the great cities, political bosses took advantage of the chaotic condition of the records and sent their followers to the polls to vote not only in their own names but in the names of the absent, deceased, and nonexistent voters. With their own henchmen in charge of the preparation and checking of the lists, this was not difficult.

Improvement in the preparation of voters' lists came with "personal registration," which required each voter to appear at stated intervals and register by filling out blanks which called for certain data about himself. More recently this plan has been modified in a number of states so that the voter need register only once, provided he does not change his home address. Public officials who are chosen for the purpose then keep the

lists up to date by such means as checking with registrations, death lists, and tax lists, and by house-to-house surveys.

The Polls

On election day, when the voter appears at the polls he is given a ballot and his name is checked off against the registration list. There are officials at the polls in each election precinct. A common arrangement is to have three judges and a clerk, two of the judges being from the dominant party of that area and one from the minority. In some of the Southern states where white Republicans are almost nonexistent, all the judges may be Democrats. Ordinarily each party is permitted to appoint a certain number of challengers for the purpose of watching for repeaters and other illegal voters.

The Ballot

The form of the ballot used at the election is important. Formerly each party or group of candidates prepared its own ballots. They were printed on long strips and carried the name of the candidate of that party for each office, from that of President of the United States down through the various state offices to the offices of justice of the peace and school commissioner in each locality. The list was a long one and the ballots were known as "shoestring ballots" from their long narrow appearance. The voter simply selected one of these strips and dropped it in the ballot box. He might make changes by crossing out or "scratching" a name and writing in another. There might be ballots prepared by factions and groups which left blank many offices in which the group was not interested, thus permitting the easy insertion of names.

This type of ballot discouraged discrimination on the part of the voter by making it easy to vote a list without even reading all the names. It also was conducive to venality, for secrecy at the polls was not carefully maintained. A political worker could agree to pay for a vote, mark the ballot, and accompany the voter to the poll box in order to see that the ballot was dropped in the box. To prevent this practice, some states prohibited all except officials and persons actually voting from approaching within a certain distance of the polls. Then the parties or factions colored their ballots in distinctive colors so that party workers could stand at the poll line and see that a ballot of the right color was placed in the box by the voter. The laws then required that all ballots be printed on white paper, but such laws were not completely effective, for even white ballots could be made distinguishable and the venal voter could be required under the watchful eye of the party worker to hold his ballot between his thumb and forefinger until he dropped it in the box. Eventually, most of the states substituted a "blanket ballot," that is, a ballot containing the names of all the candidates for all the offices, which was prepared and printed by state officials. The ballot was voted by placing a cross mark after the name of each candidate of the voter's choice.

Blanket ballots are of two general classes. The "party column" ballot lists in separate columns the candidates of each party for all the offices. The voter's task is simple. He need only pick his party column and place crosses after all the names. The other type of ballot, or "block" type, lists under each office, the names of all the candidates for that office. Usually the party of each candidate is indicated after his name. The voter must then read the names under each office and place a cross after the name of the candidate of his choice. The party column type encourages straight voting, that is, voting the whole slate of a party. The block plan encourages independent voting.

Other encouragements to straight voting, especially on the part of illiterate or partially illiterate persons, are the party circle and the party symbol. Where party circles are used, the voter may place a cross in a circle at the top of the ballot carrying the name of his party to indicate that he wants to vote the straight ticket of that party. Whether the ballot is the party column or the block type, this action automatically registers his choice for all the candidates of that party for all offices. Usually he may also place crosses after the names of candidates of other parties for particular offices, in order to indicate exceptions from the straight ticket. Thus, the party circle may be used by a man

who desires in general to vote with a particular party, although for some few offices he prefers other candidates.

The party symbol, intended particularly as an aid for the illiterate, is some device, such as an elephant for the Republicans or a rooster for the Democrats, which is carried along with the name of the party. The voter need only look for the symbol of his party wherever it appears or for the symbol at the head of the ballot, if the party circle is used, and place his cross in the circle or box beside the symbol.

Complete secrecy at the polls is essential in maintaining independent voting. The voter must not only be permitted to vote secretly but must be compelled to do so. If he can reveal his vote, venality is encouraged, for the party worker who has purchased a vote wants to make certain that he gets what he pays for.

South Australia was the first state to develop a system of secret voting, and hence the term "Australian ballot." The essential elements in the Australian ballot system are that the ballots be uniform in size, shape, and color, that they be prepared by the state and not by the parties, that they be distributed under a system of careful checking so that all ballots will be accounted for, and most of all, that the ballots be marked in secret and deposited in the ballot box in such a way that the vote is not revealed.

Most of the American states have some form of Australian ballot. A typical Australian ballot system in this country involves a "blanket ballot," prepared, certified to, and printed by public officials, and so arranged that when folded the names of the candidates are not visible; a method of distribution that accounts for each ballot; an arrangement at the polls that keeps away from the neighborhood of the ballot box all but officials and persons actually voting; and the requirements that ballots be marked only in secrecy in stalls provided for the purpose, that they be properly folded, and that they contain no identifying marks. Blind or illiterate voters may be given assistance only under careful regulations. Some states using the Australian ballot also have tried to encourage independent voting by abolishing the party

column, the party circle, and the party symbol, but there is no uniformity in this respect.

In some states, particularly in the large cities, voting machines have displaced the paper ballot. The voter enters a booth where he faces a board arranged in much the same form as a ballot. There may even be an equivalent of the party circle for voting a straight ticket. He expresses each choice by pulling down a pointer over the name of the candidate of his choice. The machine does not register until just as he leaves the booth. The voting machine is similar to an adding machine. It keeps an accurate record of votes cast for each office, which is ready the instant the last vote is recorded. Where paper ballots are used, many are "spoiled" through the fact that voters have not properly indicated their choices or through the fact that they have carlessly used markings which might be identifying marks identifying mark makes the ballot invalid. There can be no spoiled ballots when a voting machine is used, and frauds and errors in making the count are reduced to a minimum. Paper ballots have the one advantage that many ballots can be in the process of being marked at one time, while the expense of voting machines prohibits the use of large numbers for each polling place.

Corrupt Practices Acts

The corrupt use of money in elections has been one of the means by which bosses and machines have carried elections. Where a poll tax receipt must be shown in order to qualify for voting, the expenditure may merely take the form of paying the poll tax for the voter. It is not a bribe in the sense that the voter profits from the transaction, but rather is a means of overcoming the indifference of a man who is not interested in the election to the extent of paying the tax. The largest payments go to men who can control the votes of large families or of numbers of friends. It would be difficult to prove, but probably a large part of the funds intended for corrupt purposes are retained by the local leaders through whom they are supposed to pass. However, if the leaders can deliver the votes, the candidates are

not interested in how the result is achieved. Moreover, it is not a matter upon which they want to institute a public inquiry.

Another form of corruption is the use of money to influence legislation in state legislatures and city councils. It cannot be known to what extent this is done. Probably the federal Congress has been quite clear of corrupt influences. State legislatures no doubt vary a great deal in this respect. In some communities which have high standards of public morals the state legislatures seem to have reflected these standards. However, there seems to be little doubt that at times some legislatures and some of our city councils have been permeated with graft. There was a period when this seems to have been the rule in our great cities.

Corrupt practices acts are laws designed to prevent abuses of this nature. The simplest form of such laws merely prohibits bribery, and punishes both the giver and the receiver. Under such circumstances neither the giver nor the receiver is likely to testify against the other. Even when only the giver of bribes is punishable, the receiver does not desire the publicity attendant upon testifying. Other laws of a broader nature regulate the use of money in elections. For instance, they may require that paid public advertisements carry a statement of their cost, the names of the authors, and other data.

Limitations upon the amount of money that may be spent in elections and in primaries are quite common. The laws usually either name a fixed maximum for each office or specify a percentage of the salary attached to it.

The federal law permits an expenditure of \$10,000 to \$25,000 by Senatorial candidates, and \$2,500 to \$5,000 by House candidates, depending upon the size of the electorate in each case. However, it is provided that if the state law fixes a smaller amount, the state law is to be followed.

American laws have been directed particularly against corporations, since it is believed that these have used money to purchase franchises and to influence legislation. Most of the states prohibit campaign contributions by business corporations. The federal law prohibits contributions to any campaign, national or

state, by corporations incorporated by the federal government, and prohibits contributions to federal elections by any corporation.

Publicity laws have been passed in many states. They require the publication of the financial records of the candidates, showing the amounts given by each contributor and the way in which the funds were spent. The federal law requires treasurers of political parties operating in two or more states to keep itemized records of contributions and expenditures. They must file with the Clerk of the House of Representatives statements that include the names of contributors of \$100 or more and the names of persons to whom \$10 or more was expended, together with the totals. Candidates for the Senate must file with the Secretary of the Senate, and candidates for the House must file with the Clerk of the House, itemized statements of campaign receipts and expenditures.

These laws no doubt have done much to make elections cleaner. However, they may be evaded with comparative ease, at least when the public is apathetic toward enforcement. Contributions by corporations are prohibited, but contributions by officers of corporations, which may amount to the same thing, are permissible. The amounts spent in the campaign by candidates and party officers are limited, but friends of the candidates may spend unofficially with impunity. Where the public is seriously interested in the enforcement of the laws, they are more effective. Probably the only really effective remedy for corruption lies in a general and active public desire for improvement.

The British corrupt practices laws, more stringent than our own, appear to have been well enforced. Even in England, however, candidates may spend freely between elections without violating the law. Candidates who have established a reputation for openheartedness by giving sums to local charities increase their chances when election time comes. The practice of passing out money in this way is known as "nursing the constituency"

In America, what is in effect a form of bribery is accomplished

by distributing offices among party supporters. Appropriations

for projects desired by localities may amount to the same thing. These legal forms of bribery have the distinct advantage to the politician of coming out of the public purse. The people are bribed with their own money, or rather a part are bribed at the expense of the whole.

In two states, "publicity pamphlets" have been authorized with a view to equalizing election chances. In these pamphlets, each candidate is granted a fixed number of pages, for which he must pay, in which he may state his case. The pamphlets are distributed by the state among the voters. Unfortunately, the statements in the pamphlets tend to become stilted and ineffective, and the plan, inaugurated with much acclaim, has not spread.

By no means all of the money spent in elections is used for corruption. A national Presidential campaign, combined with contests for all the seats in the House of Representatives and a third of those in the Senate, together with state and local contests, involves a tremendous expenditure in entirely legitimate ways. The radio is now a recognized means of reaching the electorate, and radio time on a national hookup is extremely expensive. Traveling expenses for speakers, the rent of halls, and the cost of printing pamphlets, all add to the total. It is impossible to determine exactly what is the actual amount spent in a national campaign for all these offices, but probably ten or twelve million dollars for each of the major parties is a quite conservative estimate, when it is realized that not only do the National Committees raise large sums, and state and local committees add considerably to the total, but candidates themselves spend from their own pockets in their own campaigns, and many party workers pay their own expenses.

It has been a subject of general comment that the relative size of the campaign funds of the two parties shows a striking relationship to the relative size of their votes. This, however, does not necessarily prove that the expenditures brought in the votes. Men who contribute to campaign funds prefer to bet on a winner, and it is not unlikely that they give much more freely to the party that in their opinion has the better chance of carrying the election.

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CASE

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CHAPTER XXIV

The Administrative Personnel

Sports of Office

One of the human forces that keep the governmental machine in action is the administrative personnel, and in relation to these public servants some difficult problems arise. All large organizations, private and public, are faced with complicated problems in relation to their employees. The small employer owning his own business may give jobs to his relatives and friends if he pleases, for he himself sustains any losses that may occur through their incompetence, although there may be objections on ethical or social grounds to the importation of relatives, friends, or favorites to the detriment of other employees who by faithful service have established moral claims to greater consideration.

In large corporations the stockholders are the owners, and nepotism and favoritism by officials or large stockholders are unfair for the reason that every stockholder is entitled to expect that officers shall not exploit the corporation for their own ends. Yet such favoritism is by no means uncommon.

Government is a large employer of labor, and in its dealings with employees it is subject not only to all the influences that beset the private corporation but, in addition, to an even more destructive element, that of political considerations in the choice and promotion of employees. Government is particularly vulnerable, since inefficiency is more difficult to determine in a government than in a corporation. The success of the latter can be determined by one supreme test, that of profits. Too great an inefficiency will lead to a decrease in the corporation's revenue. On the other hand, government performs functions of a social nature less susceptible to measurement. Moreover, since its func-

tions are large, monopolistic standards of comparison are difficult to find.

In the judgment of most observers party politics is the most serious danger that confronts our governmental administrative system.

Even before Andrew Jackson's administration, politics had played a part in federal appointments. Vacancies were filled from the ranks of the party in power. It was even alleged that judgeships were created with the purpose of caring for party members. Jackson's contribution lay in the wholesale discharge of old employees in order to create vacancies to which faithful party workers could be appointed. While Jackson did not coin the phrase "to the victor belong the spoils," his philosophy and practice were in full accord with the thought.

The spoils system became entrenched in the federal government and in the states and cities. It still permeates state and local governments, and plays a considerable rôle in Washington. In the states there is often an unofficial dispenser of patronage, a man who stands close to the governor and whose approval gives clearance for appointment to office. Within the federal system the chairman of the national committee that conducted the campaign for the incumbent of the Presidency, and who is likely to hold the post of Postmaster General, is looked upon as the patronage officer of the administration.

The argument against the spoils system is a familiar one. Work suffers through the appointment of men whose chief qualification lies in having supported the winning candidate for office, or in knowing the men who did. They know that retention of their positions depends upon this support and not upon their efficiency or devotion to duty. The morale of the service suffers because promotion is not open to faithful workers, competent men and women often are unwilling to enter the system, and the rapid turnover in personnel is inconsistent with good service.

Restraints Upon Spoils

In mitigation of this indictment, however, it should be added that systems of appointment without civil service examination are not always permeated with the spoils idea. The state of Virginia, with no civil service system for its employees, has nevertheless maintained an excellent tradition of stable and permanent service. Even where spoils predominate, some degree of restraint exists. No political party would be so lacking in foresight as to remove all established employees at once and install a completely new set of officeholders at one stroke. Some employees must be retained at least for a time sufficient to instruct the others, and they may then become established in the minds of their new superiors as desirable. In addition, certain key positions calling for technical knowledge are recognized as such and the holders may serve unmolested through successive changes of administration.

A Means of Executive Control

Destructive as the spoils system may be upon administrative efficiency, its most serious aspect is the control over the legislature that it gives to the executive.

Members of the legislature look to the executive, if he is a member of their own party, to appoint their constituents to administrative offices. The result is subservience to the executive. The members of the legislature submit to executive dictation in order to secure their share of the spoils. Some Presidents have been charged with using the threat of loss of patronage as a club to control Congressional action.

The Reform Movement

Nevertheless, the advantages of a strong merit system have long been recognized. The civil service reform movement began before the Civil War. In the middle of the century an attempt was made to establish some requirements for certain federal positions, but the examinations were not competitive and eventually the plan was abandoned. In 1871 another attempt to set up requirements was made and a civil service commission headed by George William Curtis was established. Difficulties arose and this effort also was abandoned. It was not until the 1880's that the reform movement began to bear permanent fruit. The assassination of President Garfield by a disappointed office seeker

focused public attention upon the evil results of the spoils system and furnished an impetus to the movement.

The Act of 1883

In 1883 the state of New York adopted a civil service act, and in the same year Congress passed the Pendleton Act, which is still the basic law of the federal civil service system. This act established a Civil Service Commission, provided for the classification of certain employees in the Treasury and Post Office Departments to which vacancies were to be filled by examination, and, most important of all, gave power to the President to order classifications of other positions and place them under examination. Under this broad power Presidents have, from time to time, brought new groups under the jurisdiction of the Civil Service Commission.

Extensions of the Classified Service

This power to order the classification of new groups and to bring them within the purview of the "merit system" has been the basis for most of the growth of the civil service. It is subject to one defect. A President conceivably may appoint his own party adherents to positions in a group not within the classified service. Then, he may order a classification and place these positions under the jurisdiction of the Civil Service Commission, thus giving the protection of civil service status to his political appointees while future vacancies can be filled only by examination. The process is known as "blanketing," for it blankets these positions with a civil service status, presumably protecting the incumbents from removal by later Presidents. However, it does not follow that Presidents have consciously abused the act in this way.

Whatever may be the defects of the plan, great extensions of the merit system were made under this Presidential power, and gradually the civil service system developed. The morale of the bureaus in Washington improved correspondingly. The service attracted able men who often refused offers of higher pay with private concerns rather than part with the permanent tenure, the prestige and the opportunities for the use of laboratories and records that Washington afforded.

Recessions

Until recently, recessions in the progress of the merit system in the federal government have been few. The first serious disturbance to tenure occurred in the administration of President Harding, when, by Presidential order and without warning, a large group was discharged from the Bureau of Engraving and Printing. Later, this act of injustice was corrected so far as was possible by returning to their positions such as had survived the intervening period.

In 1933, a change in administrations that was also a change in parties took place in the midst of a depression, and the pressure of party workers for office was greater than usual. The first step was the wholesale discharge of workers on the grounds of economy. The weeding-out process was systematic and ruthless. After a few weeks of "economy," there was then ushered in the greatest period of governmental spending that the country has known. New bureaus came into being with such rapidity and so many changes of name, and consolidations, divisions, and alterations took place so quickly, that ultimately there was issued an official loose-leaf publication which could be kept up to date by inserting the notices of changes as they appeared.

During the Hoover administration a number of emergency bureaus had been created and placed outside the classified civil service. These became precedents in the establishment of most of the new bureaus in this expansion of the Roosevelt administration. To these new bureaus there flocked the faithful adherents of the administration, the friends of faithful adherents, and persons who could get "clearance" through their party machines. Lists were maintained of civil service employees who had lost their positions, but persons on these lists appear to have had little actual preference. The extent to which offices were treated as spoils varied with the department and bureau. Some, such as the Tennessee Valley Authority, although not under civil service, appear to have excluded politics quite thoroughly. In

general, however, an endorsement from the chairman of the local democratic committee "back home," acceptance by a Senator from that state, and approval by the national patronage dispensers were a most desirable prelude to an application for office This, and the personal influences of a friend within the bureau, made a happy combination for the applicant.

Their supposedly temporary nature was an excuse offered for removing the new bureaus from civil service protection, although, as a matter of fact, a considerable number of them are likely to remain as permanent bureaus. It was also alleged that the machinery of the Civil Service Commission would have been too slow in the emergency. However, no such difficulty was experienced even by President Wilson during the war period. On the whole, the morale of the federal services received a severe setback.

One of the most unfortunate occurrences during this period was the "unblanketing" of certain groups by Executive Order. These groups, one in the Bureau of Foreign and Domestic Commerce, and one in the National Soldiers' Home at Johnson City, Tennessee, had been brought within the classified service by President Hoover. Presumably under the assumption that this had been an attempt to protect political appointees, President Roosevelt withdrew the blanketing order, thereby leaving these positions open to patronage. The order applied even to civil service employees who had been promoted into such positions in the usual order of procedure. Subsequently, the "unblanketing" order was rescinded in its application to the Johnson City group, thus again placing under civil service any of the old employees who might be left. The Bureau of Foreign and Domestic Commerce had been one in which Mr. Hoover as Secretary of Commerce took much interest and his appointments of "commodity chiefs" and research workers appear to have been made with rather less than the usual political bias. The Roosevelt "unblanketing" orders constituted the greatest blow to the orderly development of the Civil Service that had occurred since the Harding discharges.

Perhaps it was in anticipation of such retaliatory measures that an executive order of July 6, 1936 (No. 7408) was issued

giving a "competitive civil service status" to persons (with certain exceptions) whose positions should subsequently be placed in the competitive classified service, provided such persons should pass a noncompetitive test, secure a recommendation from their department heads, and meet certain formal requirements. Subsequently, in June, 1938, an executive order to become effective February 1, 1939, provided for placing in the classified service all non-policy-forming employees, unless specifically exempted by law or specially exempted. Incumbents of these positions were to be placed in the classified service provided they were recommended by their administrative heads as having rendered satisfactory service for not less than six months and provided they passed a noncompetitive examination. Persons who failed such examination might nevertheless be retained upon recommendation of their administrative heads.

An act of Congress in this same month, June, 1938, provided that the position of postmaster in the first-, second-, and third-class post offices should be filled by promotion or by competitive examination, but authorized the incumbents to be made permanent by noncompetitive examination. However, appointments are to be made by the President with the advice and consent of the Senate.

Civil Service Organization

Civil service systems in the states vary greatly in plan of organization. Neither is there any uniformity upon the kinds of positions to which they apply. A number of states have no civil service system either for state or local employees. A large group have no civil service system for employees of the central state government but have authorized city governments to adopt systems of their own. In a considerable number of those states in which municipal systems are authorized, only a single city or a very few cities have availed themselves of the opportunity. Several plans are followed in respect to the relationship between state and local civil service systems. The state may have its own system and each city may be authorized to set up one that remains independent of the state plan. Other states maintain through the central civil service commission a degree of supervi-

sion over local commissions, as, for instance, by making the regulations of local authorities subject to state approval or by conducting all examinations through the central authorities. In others, a single agency is maintained, as in Massachusetts, where all cities are brought under jurisdiction of the central authorities and towns are permitted to come in under the system. Civil service systems are more often found in large cities than in state central governments. Even where they exist, however, they do not apply to all employees. A considerable number of offices, especially the more important ones, are often filled by election, while others are appointive. Rural areas have been little touched by civil service reform.

Distribution of Employees

There are over 175,000 separate political jurisdictions in this country, including the federal government, the state governments, counties, cities, towns, school districts, and other governmental areas. In these jurisdictions there are probably between three and a quarter and three and a half million public employees, all told, constituting nearly one-tenth of the total number of gainfully employed persons in the country. Their salaries and wages total around four and a half billion dollars a year, or over a tenth of the national income. Well over a third of our taxes go into the pay of public employees. Roughly, a third of these employees are engaged in education, and one fourth are in the federal service.

Less than a third of the total number of public employees are appointed through civil service systems. However, over a third more are chosen under plans that employ at least minimum standards for appointment. This group includes those engaged in education, most of whom must secure certificates by examination before being appointed.¹ In the assignment of schools among those who have certificates, however, politics, especially local politics, may play a part, particularly in rural areas. The army, navy, and marine corps are not recruited through the Civil Service Commission, but, nevertheless, appointees must pass certain rigid examinations.

¹ See p. 732.

Even the remaining third are not all treated as spoils. It has been noted that sometimes custom has given rise to a concept of tenure, as in Virginia, which mitigates the rigors of the spoils idea. The vast number of elective offices is likely to go with each election to the dominant local party, and from this point of view should be considered spoils. However, they are different from appointive offices in that the voting public maintains control and the dominant party does not necessarily secure every office. The idea of appointment through examination or through strict standards is strongest in the federal government, next in the cities, next in the central state governments, and weakest in the rural areas.

Caval Servace Commissions

The typical civil service agency is a board, usually of three members. The federal Civil Service Commission consists of three members, of whom not over two are to be of the same political party, chosen by the President and Senate for an indeterminate term. While commissioners are not required to resign with each change of administration, usually at least one does resign soon after a new President comes into office, and the average length of service has been less than five years. State commissions usually are chosen by the governor and upper house, for overlapping terms of three to six years. A bipartisan composition is commonly required.

Examinations

The chief function performed by civil service commissions has been in connection with the recruitment of personnel. This is carried out by examination, which may be written or "unassembled." Written examinations are used for the great mass of clerical, typing, and stenographic positions. Higher positions involving research and administrative ability may be filled through "unassembled" examinations, which are based upon evidence of training and experience and upon studies and publications to the credit of the applicant. The greatest success has been attained in connection with the written examinations, where specific questions and problems can be presented and where

standards of grading are easily determined. Unassembled examinations involve wide differences in judgment upon the qualifications of the applicant, and much less success is likely to be obtained in passing upon the personal qualifications that are so important in connection with the higher positions.

There has been much criticism of written examinations in the past because of their tendency to test specific ability in relation to the particular position to be filled rather than to test general capacity. The highest ranking applicant under this system may not be so well fitted for promotion to a higher type of position after entering the service as would one lower on the list whose intellectual and educational qualities are higher. There has been a tendency in recent years to make use of certain types of tests developed by psychologists which are intended to measure intelligence rather than specific knowledge or skill.

American civil service examinations are often compared with the British. The British examinations for the higher ranks of service are a test of the educational and cultural background of the applicant. They are not based upon the particular knowledge needed for any specific position, but are designed to aid in the selection of men of fine educational background. The British examinations, even for the lower positions, emphasize educational qualifications. The American examinations are of a "practical" or specific nature, directed toward ascertaining qualifications for a particular kind of position. The British type is designed for persons who prepare for the government service as for a profession of great dignity. Unfortunately, however, the British examinations for the highest positions are of such a nature as to exclude any persons who have not had the advantage of the training afforded by an aristocratic type of educational system which is found in that country.

Appointments

The highest ranking applicant in American civil service systems is not automatically appointed, either in the federal civil service or in the services of the states and cities. Usually the appointing officer is permitted a choice of the highest three, and

even then may, with permission of the commission, reject these and request other names. The plan of giving a choice to the appointing officers has been followed in part because it has appeared best to leave something to the judgment of administrative chiefs. It can also be traced to constitutional provisions which are interpreted by the courts to make it impossible to take away all discretion from appointing officers. A choice among three names still leaves a discretion to such officers. A probationary period of six months is customary before the appointment is made permanent.

It is customary to give a preference to war veterans in the prepation of civil service lists. This may take the form of requiring the veterans merely to make the passing grade in order to be listed ahead of all others, or it may simply grant a certain number of points which are added to a veteran's percentage grade. Disabled veterans sometimes enjoy a preferred status and even widows of veterans may receive special treatment.

In the federal service there is another rule that disturbs the ordinary process of appointment. It requires that appointments be apportioned as nearly as practicable among the states and territories according to population. This rule is a vestige of the old spoils idea, under which appointments were looked upon as favors to be distributed rather than as services to be undertaken by the best qualified person.

After appointment, civil service employees usually are restricted in their political activities. They are not denied the suffrage, but may be prohibited from serving on party committees, soliciting funds, or making political speeches. In Wisconsin, all political activity during working hours, and excessive activity at other times sufficient to injure the quality of their work, is prohibited.

Objections to Civil Service

Criticism of the civil service system is not wanting. Charges to the effect that it establishes a bureaucracy which loses the human touch and becomes autocratic in dealing with the public have little merit. Even though such tendencies appear, a trained

personnel under modern conditions is so essential that the solution would seem to be the maintenance of a proper attitude among public servants by methods other than the sacrifice of the merit principle. Politicians often say that they could name better appointees than those chosen by commissions. Even though this were true, it by no means follows that they would. Personal and political considerations would outweigh merit, although of course it is true that able men often are chosen for office by politicians. No doubt they prefer to name able men rather than poor ones. From the point of view of the politicians themselves, it has been said that the man who makes the appointment gains one lukewarm friend and many active enemies. This probably has some truth in it, but it must be admitted that the practical politicians, who ought to know the effects, seem to prefer the system of patronage

Personnel Administration

In recent years the concept of the duties of civil service commissions has broadened greatly. Their functions are not regarded as relating only to appointments. Instead, they are acquiring broad powers in the administration of personnel.

Promotions

One problem which civil service commissions are called upon to consider is the working out of plans upon which promotions may be based. Three methods of determining promotions have been used. The first is the simple judgment of the superior officer. Unfortunately, this may be based upon impressions which the superior himself has not weighed. In an effort to secure a more careful and objective analysis of subordinates, the second plan, based on an efficiency rating was devised. Upon a sheet designed for the purpose the superior gives a numerical or other rating upon each of certain qualities and characteristics, such as quantity of work completed, quality of work, ability to cooperate with others, punctuality, and the like. These qualities then are given a numerical rating, combined perhaps with points for se-

niority, and a total arrived at, which becomes the basis for promotion, demotion, or removal These ratings serve a useful purpose in encouraging analysis of subordinates before promotions are made, but numerical ratings have a deceptive quality, so that superior officers may see a difference of a few points between two employees and come to think of one as just that much better than the other, whereas such ratings can have only an approximate value at the best and in general are useful only in encouraging care and analysis in making promotions. A likely effect is that grading officers will adjust their ratings to fit their preconceived idea of the relative merits of the subordinates. Service ratings have lost considerably in public confidence since their inception.

A final method of effecting promotion is by examination. Unfortunately, examinations are likely to be tests of factual knowledge. The young man just out of school or college may have a much better chance of passing with a high grade than the ablest of experienced employees who has left his schooldays behind him years before. In the federal service, President Roosevelt's order of June, 1938, envisaged a system of credit in promotions for work taken in colleges and universities.

Removals

In general, the appointing officer has the power to remove, but the laws have placed restrictions upon this power. Dismissals from the service may be limited to specified causes, such as incompetence, dishonesty, and so forth, or there may merely be provision that the charges be stated in writing. Some jurisdictions require that a hearing be granted the dismissed employee. When this hearing is before the official who ordered the dismissal, it is not likely to lead to a reversal. When it must be before the civil service commission or a personnel board, reversal is more likely, but the actual effect is to render the official cautious, so that removals normally take place only when there is good cause. In Massachusetts, removals may be appealed from the officer concerned to the courts, but this procedure is so cumbersome that dismissals are almost impossible.

Classification

The determination of the salaries for the various positions in the civil service cannot be put upon a solid basis until the positions have been classified, so that those of the same nature and calling for the same capacities are in the same class. To do this, each position must be studied and analyzed. Each class of position is given a maximum and a minimum salary, and the employee who enters at the minimum may rise through longevity and good service to the top of that grade. His next promotion must come through transfer to another position in a higher class. This is the system followed in the federal service.

Retirement

Another problem in connection with civil service personnel is the establishment of retirement systems. Such systems are needed to care for superannuated employees as well as to improve the quality of the work of the government bureaus by removing men who are unable to carry on their duties because of age. In the cities, retirement systems for police and firemen are found almost everywhere and retirement systems for teachers are becoming the rule. The federal government has a retirement plan for employees, as have a number of states. Usually these are "contributory" systems in which a percentage is deducted from the salary of the employee which goes into the retirement fund, and to this the state adds a sum. A few states have a noncontributory system, in which the state furnishes the whole amount.

The federal government has a contributory system, three and one-half per cent being deducted from the basic pay of the employee each payday. The retirement age is seventy for the largest group of employees, sixty-five for certain others such as letter carriers, and sixty-two for those in certain more arduous forms of employment. The minimum annuity of an employee with thirty years of service, in five consecutive years of which he received at least \$1,600 a year, is \$1,200. Fewer years of service or a smaller salary brings a smaller annuity. Larger salaries permit larger annuities. There is special provision for persons involun-

tarily separated from the service at ages earlier than the normal age for retirement. Retirement systems are not usually administered by the civil service commission, although the commission is likely to be consulted upon proposed plans.

Organization of Commissions

These functions of civil service commissions have gone so far beyond the original concept that a tendency toward a separation of duties has taken place. The commission remains as a body for the making of rules and the final decision upon cases and problems, but one of the members may then take over the administrative work of actually conducting examinations, carrying out classifications, and the like. In other jurisdictions the commission relies upon an official not of its own membership to take over the administrative duties. Maryland enjoys the unique distinction of a one-man civil service commission who is also the administrative head. The effect has been in fact to set up a civil service bureau headed by an administrative officer, in place of the older idea of a commission.

Report of the President's Committee

In this connection, the President's Committee on Administrative Management in 1937 reported in favor of abolishing the federal Civil Service Commission and setting up in its place a civil service administrator, assisted by a nonsalaried lay board of seven. The latter would serve as a watchdog of the merit system, giving advice, conducting investigations, and making reports, but apparently having no actual powers except to appoint a special board which will conduct examinations of candidates for the office of civil service administrator when a vacancy occurs; this board will certify to the President three names from which the office might be filled. The administrator would have all the duties of the present commission and apparently in addition would have powers of control over employees in the government bureaus.

The plan of the President's committee appears to center around the idea that a Civil Service Commission should not limit its work to such functions as selecting personnel, carrying out reclassifications of positions and similar functions, but should acquire certain positive powers of control in relation to personnel, carrying on "in-service" training, effecting transfers from one department to another, and becoming a central body for the control of personnel. In performing these functions it would act under the direction of the President, who would thus, according to what appears to be the theory of the report, assume his proper position as the head of the administration.

The value of some phases of the plan is subject to question. In the past, Congress has been more closely associated with the departments as a directing force than has the President. It has carried out this function through its power of legislation and through the control exercised through its power of appropriation. The Civil Service Commission has not been an agency of the President, but a body to enforce the law of Congress. A plan to subordinate the Commission to the President would bring about a new relationship, and it is doubtful whether Presidential control of the kind that evidently is contemplated is consistent with Congressional authority. Since our President serves for a fixed term, and not at the will of the legislature as in cabinet-governed countries, it is doubtful whether Congress should surrender its power of control to him.

Another objection lies in the fact that there would be grave danger of losing the independence from politics that the Commission has enjoyed in the past. Subordination to the President would open the civil service authorities to the danger of pressure from him and would tend toward fluctuations of policy with each administration. It may even be questioned whether individual politicians might not more easily influence a single civil service administrator than they would a commission of three.

A still further objection lies in the question whether a central agency could properly exercise positive powers of control. It would seem that such powers are best exercised by the administrative officer, who knows both the individual employee and the job to be done. In a small system employing a few hundred or a few thousand persons, a single central office might have this knowledge, but in the federal government, employing over 800,000 persons, of whom only a small part are in Washington, while

the great bulk are scattered over the whole country and to some extent over the whole world, no central agency could have the necessary knowledge.

However, there is no question that positive personnel work is needed in the federal service and in the services of the states. There has always been some such work, there has been much improvement in the past, and there is more improvement to be made.

The Federal Council of Personnel Administration

Beginning in 1931 the federal Civil Service Commission had the assistance of an advisory body, set up originally by President Hoover and known as the Federal Council of Personnel Administration. It included the heads of departments, the president of the Civil Service Commission, the director of the Bureau of the Budget, the chairman of the Interstate Commerce Commission, and the Administrator of Veterans' Affairs. Its function was to bring together the common personnel problems of the various scattered bureaus, conduct investigations into proposed solutions, make recommendations to the Civil Service Commission, and take steps toward a common solution of administrative problems over which the Commission does not have jurisdiction. Thus, it had some of the aspects of a lay advisory board, but it might also carry out plans of an administrative nature whenever the members were in agreement upon a common policy. An example of effective work by this body was its cooperation with the Civil Service Commission in putting into effect a new system of efficiency ratings for federal employees. President Roosevelt's order of June, 1938, substituted a Council of Personnel Administration, with similar functions, to include the directors of personnel in the various departments and independent establishments, and certain other persons.

Extension to the Upper Grades

Probably the one thing that would accomplish most toward the fulfillment of a well-developed civil service system in this country would be its extension into the upper grades of the service so as to include all officials except those whose duties are of a political or non-policy-forming nature. No civil service system is safe until the upper grades are filled by men who are in sympathy with its principles. In Great Britain, a permanent civil service system functions through all changes of ministries. It includes all but the members of the ministry. Thus, the British draw a distinct line between the political officers, the ministry, and the permanent technical administrative service which furnishes impartial advice to all ministries of whatever party and carries out their policies faithfully. Such a system offers an honorable career to a young man. It attracts the best of minds, which in this country are likely to be diverted into other professions, and by drawing into the service a body of able and intelligent administrators lends stability to government throughout the confusion of political mutations and upheavals. The tendency of the British system to draw its higher personnel from a limited social class is not a desirable feature to be transplanted to this country. Its clear separation, however, between the political and the administrative functions is worthy of most careful consideration.

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CHAPTER XXV

Government By Minorities

Minorities in the Governmental Structure

Even the most superficial survey of the national and state governments will show that the majority does not always rule. The very structure of these governments in many respects violates the principle of majority control.

The equal representation of the states in the federal Senate without regard to population is an obvious example. The election of the President by electors of whom there is one for each Senator, in addition to those based on the number of Representatives, involves an extension of this principle. More important than this, a mere plurality carries the entire electoral vote of a state, with the result that there are large unrepresented groups in many states. "Minority Presidents" may result.¹

The state legislatures, especially in New England, sometimes are based upon plans of representation that discriminate against certain areas.²

It is evident that our federal Constitution and state constitutions have not followed strictly, even in form, the theory of equality of representation on the basis of population. As these constitutions function, minority control appears in other respects. The party system in legislative bodies may be organized around the caucus, and this may lead to a form of minority control.³ In this instance, the minority rules in fact, although the majority possesses an ultimate or potential power.

While these forms of minority rule sometimes have come under criticism, they do not constitute the most serious departure from the democratic principle. The equal representation of the states

¹ See p 140.

² See p 324.

³ See pp 113, 123, 443.

in the Senate is the result of historical conditions. It may even be argued that the representation of areas without regard to population has some justification where there is need to protect sparsely populated states from domination by other regions of dense population. "Minority Presidents" result in large part from the accidental distribution of the membership of parties, and it cannot be said that any one group in the population is the permanent beneficiary of the system. The binding caucus may lead to minority rule, but it is only the acquiescence of a majority that makes the caucus system possible. All of these may be instances of violation of the principle that the smaller number should not prevail over the larger, but they do not represent minority rule in its most dangerous manifestation.

The Pressure Group

Minority government as it occurs in this country in its most objectionable form is not the result of any provision of constitution or law or even of party rule. It operates under the forms of majority control and uses the majority principle to its own ends.

A not inconsiderable part of our legislation is the result of pressure from active and aggressive minorities. A group of voters desires to bring about or prevent the passage of an act. It is legislation that affects that particular group. Its members have a private interest in its enactment. To them it looms up large in importance and outweighs all other proposed legislation. They are likely to place the success or failure of that law above all other considerations. They will think in terms of that law and not with a view to the welfare of the country as a whole. Their votes and influence in the next elections will be cast with that law, and that law alone, in mind. Congressmen know that their own election may depend upon the attitude of this group and a number of similar groups.

Upon the legislation supported by these organized groups the general public is comparatively apathetic. The average individual has no opinion upon its value. He may not even know that

it is under consideration. If he does, he is conscious of his own lack of information upon its merits and does not feel competent to decide upon its worth. He assumes that the elected representatives of the people will analyze its provisions and be governed by its value to the public as a whole. In any case, his own interests are only remotely affected.

The Unorganized Public

The general public, therefore, is unorganized and apathetic, while the organized minority is vitally interested. Even though the minority is a small one, apparently hopelessly outnumbered, nevertheless it may have its way, for members of the legislature know that their votes will be dependent upon the one issue, while the general public will soon forget its disappointment. Legislators know that with the general public it will be easy to evade responsibility. "Everybody sees but few understand," said Machiavelli in the sixteenth century, and while conditions have changed, men are much the same as they were when the Italian philosopher thus summed up his opinion of what is now the electorate.

The Representatives of the People

The elected representatives of the people should be the bulwark of the public against the selfish interests of minorities. The actions of a legislator, however, are governed by many influences and one of the most potent of these is a desire for re-election. He knows that the organized groups may determine his own political fate, and in surrendering to their dictation he may have recourse to the consoling philosophy that if he does not meet their demands his successor will.

Moreover, the legislator cannot be completely informed upon all proposed legislation. However conscientiously he endeavors to inform himself upon a measure, he is to a very considerable extent dependent upon information furnished by others. He is bombarded with arguments from the organized minority, while the general public ordinarily is inarticulate. There is seldom a cause so entirely devoid of merit that a plausible argument cannot be built up in its favor, especially when no case for the opposition is presented.

An Example

A tariff bill is in process of passage in the national Congress. It is a long and involved measure. The ultimate effects of its levies are difficult to determine. No member of Congress can know all the results that may flow from each rate. Persons with a direct interest in the bill will certainly present their case. An industry that will profit from an increased rate upon a foreign commodity can be depended upon to present its side of the question. But the general public has no special representatives to present its case. When another industry or group has interests that conflict with those of the first, of course it will supply active opposition, but the public is not adequately protected when it must rely upon the hope that one selfish interest will neutralize another. Too often the two conflicting interests will reach a compromise in which the public loses in two ways instead of one.

The Old Lobby

The obvious advantages that result from organization have led to the formation of numerous permanent bodies which have for one of their principal purposes the influencing of legislatures and the formation of public opinion upon measures of interest to themselves. Trade associations, farmers, veterans, and business groups are active in legislative matters. In several instances, the power of the veterans and farmers has been exercised recently in dramatic fashion, but other pressure groups have not been less alert to their own interests.

The activity of special groups in advancing or opposing measures of interest to themselves is known as the lobby. The lobbying methods of the past were crude and probably much less effective than those of the present time. The old lobby in its most objectionable form consisted of bribery of one kind or another. In any case, the legislator was approached privately. In his office or hotel room he was made to see the light. No doubt

some of the old lobbying methods are still in use, but outright bribery probably is extremely rare.

The Social Lobby

A phase of the personal form of bringing legislators to the right way of thinking is the social lobby. Election to the Brit-1sh Parliament carries with it admission to the most exclusive London society, and it has been noted that under the influence of the cream of British wealth, culture, and conservatism even the most radical of labor members often have acquired subdued ideas concerning the need for a changed economic structure. In the United States, election to Congress does not in itself bring the member into "society." Most members of Congress and of state legislatures are men of simple tastes and are not greatly actuated by social ambition. They have no desire to break into any exclusive group Furthermore, the election chances of a member may be seriously jeopardized if his opponent can report that he has been in the habit of moving in social circles where only a long-tailed coat may be worn. However, the members have wives and daughters, and soon may find themselves on the fringes at least of Washington society. It is suspected that under the mellowing influence of good food and charming company the rough edges are taken off some of the most radical plans.

The New Lobby

However, the modern lobby has gone beyond such diffuse tactics. It is organized, vociferous, and insistent, and operates openly and in full daylight. It may even, with some justification, resent the term "lobby." The Chamber of Commerce of the United States occupies a marble building facing the White House across Lafayette Square. Its member organizations are spread out in cities and towns over the entire country. These local organizations consist of business men who presumably are active and influential in their communities. If an important matter of interest to business men is up for consideration in Congress, the Chamber may conduct a poll to determine the opinion of its membership. The results of this poll may be distributed

to the members of Congress. If it is evident that the great mass of business men of the country are opposed to a measure, the party in power will pause before running counter to their vote and influence. Moreover, even though a Congressman is indifferent to the opinion of business men in general, he is acutely alive to the opinion of those in his home district. When the Chamber of Commerce in his home town has expressed itself, he cannot afford to be indifferent. This form of lobby has none of the objectionable features of the old type with its secrecy and sinister methods. It operates in the open. However, it is none the less potent. It represents the opinion of its member organizations. A vote having determined the position of its membership, it actively supports that position in Congress and with the public.

The Chamber of Commerce of the United States is only one of the organizations of business men that are represented in Washington. There are many trade associations with offices in the capital, and each of these may be depended upon to support the interests of its members. It is not to be inferred that such organizations exist for lobbying purposes alone. Some carry on important research work for their members. However, when legislation affecting its membership is brought up in Congress, the organization may be depended upon to represent the group interests. Its representatives will appear before committees, favorable facts and figures will be made available, and even the newspapers may be resorted to in presenting the case. In addition to these organizations, there are individual businesses that can afford staffs of their own for legislative purposes.

The Justification for the Lobby

Lobbying of this nature is not necessarily bad. Congress or a state legislature should always have before it the arguments of any industry or other group that would be affected by its laws. Intelligent legislation cannot be enacted in the dark. Moreover, no one can find fault with any group for organizing either to protect its interests from adverse legislation or to secure the passage of needed laws. It is essential to democratic government that the individual be permitted to present his case before the legisla-

tive body. No interested group, whether in the minority or not, should be denied an opportunity to present its case. Democratic government exists not merely to express the will of the majority, but has as an important function the protection of minorities.

The Need for a Presentation of Both Sides

The weak point in the system comes from the fact that upon matters that have no great dramatic appeal, only one side is likely to be adequately represented. Only those who will profit or lose directly by the proposed legislation will be sufficiently interested to present their case. They are the only ones who are likely to organize for that purpose. Every individual or group that will receive funds or special advantages from a proposed act has a direct and tangible interest in the matter. The legislature certainly will be presented with the case for that group.

On the other hand, the average citizen will lose so little from any single appropriation or will be affected so indirectly by questionable legislation that he is not vitally interested. He will not band with others to bring about the proper presentation of the case for the public. The public, unrepresented by counsel, is at a disadvantage against the arguments of counsel for the special interests.

Pressure

Organized minorities do not stop with the mere presentation of arguments. Their chief reliance is upon pressure brought to bear upon the legislators. Members of the organization are urged to write to their representatives in the legislature advocating the passage or rejection of legislation. As a result, the representatives find their mailbags crammed with letters. Hundreds of telegrams are received. It is hoped that this will create the impression that there is a rising tide of public opinion of which the legislature should take notice. Experienced members learn to recognize such communications. They are likely to be expressed in identical language or show other characteristics of synthetic spontaneity. As true expressions of public opinion their value is discounted.

Pressure upon an individual member may vary, being dependent upon his background and the conditions in his district. A woman's organization is credited with having originated a card catalogue of the members of Congress, giving intimate details of the tastes and habits of each member, in addition to information upon his political record.

Lobbying is not limited to the abstract presentation of arguments. Where personalities count for so much and where the stakes are so high, some organizations will go beyond the bounds of propriety to attain their ends. It speaks well for the integrity of elected representatives of the people that capable observers believe that instances of corruption are rare.

The real danger in the lobby lies around the one most vulnerable spot in the make-up of the legislator—the desire for re-election. He knows that his continuance in public service may depend upon the support of these minorities and he surrenders to necessity. His conscience is salved by the realization that if he should refuse to cooperate, an unscrupulous opponent at the polls is likely to come forward and gather to himself the influence of these groups.

Regulation

Some states have attempted to regulate the activities of lobbyists by requiring by law the registration of the paid legislative agents of corporations and other organizations. Sometimes the rules of the houses bar these agents from entering the legislative chambers. However, such laws are not effective in preventing lobbying. The paid lobbyist does not need personally to approach members of the legislature. It may be much more effective to do this through one of the member's constituents. No member can refuse to listen to the pleas of voters from his district. Furthermore, the lobbyist may be in the right. The industry he represents may actually be endangered by pending bills or in need of new legislation. Members who have no opportunity to extract needed information in committee must secure it in other ways. As representatives of the people, they must keep in touch with public opinion and this they must discover as they may.

The British Plan

The British are not troubled seriously with the lobby for the reason that public bills originate with the ministry, which consists of party leaders responsible to their party and ultimately to the whole country. The success of the ministry will be measured by the benefits accruing to the country as a whole. The individual member is unable to alter the course of legislation. So long as the lower house supports the measures of the ministry. the individual member has little influence upon legislation. The one great question for him to determine is whether he will support the ministry. When the House decides otherwise, there must be either a new ministry or a new House. As a result, the British do not have that form of minority control that arises from the fear of individual members that their vote upon issues of local interest will lead to defeat in their districts. The British do have the problem of large national groups, such as labor, which may demand as the price of support, a dole or other measure particularly of interest to themselves. However, the questions in which such groups are interested are national in scope and therefore the attention of the country can be centered upon them. Moreover, their demands must be presented to the country as demands upon the party in power, or in the form of the objectives of a national political party. Their ends cannot be achieved by the exercise of secret influences upon individual members of Parliament.

The Need of Responsible Authorities

Solution of the problem in this country may lie in bringing about a concentration of power such as has taken place in Great Britain. However, this power cannot well be placed in the hands of the executive, since here the President or the governor of a state cannot be controlled by Congress or the state legislature. The legislative branch cannot properly delegate such powers to the executive. It may be, however, that something can be done to strengthen the hands of the legislative leadership upon public bills so as to give it a greater directive power. It is not entirely certain that the revolution of 1909-1911 in the House

⁴ See p 92

of Representatives has been salutary. A responsible Speaker, with strong party control, owing a responsibility to the country as a whole, provides a system better suited to withstand the shock of minority onslaughts than does a more diffuse control which is not so clearly responsible.

British Private Bills

A considerable part of the lobbying in America occurs in connection with private bills. The British escape this type of lobby by providing a special process for private bills which gives them a form of judicial consideration. No member is dependent for re-election upon success in securing the enactment of private bills for his constituents. It should be added that the term "private bill" as used in Great Britain covers a wider range of measures than it does in the United States. In Continental countries the field of private legislation is narrowed through the fact that administrative departments have jurisdiction over many matters that with us must become the subject of special legislation. To some extent, the British also have delegated power to government departments.⁵

Judicial Bodies as a Remedy

Upon some matters that normally would be the subject of lobbying Congress has taken steps that resemble somewhat the British and somewhat the Continental plans. The United States Court of Claims was set up to handle certain classes of claims that previously could be settled only by action of Congress. These claims are heard and settled judicially by the Court. It is true that Congress must provide the money for their settlement, but this is a matter of form. In addition, such bodies as the Interstate Commerce Commission and the Federal Trade Commission treat by judicial process other matters that otherwise would almost certainly be the subject of lobbying tactics.

The activity of pressure groups operating upon legislatures is one of the most serious menaces to democratic government. It is a contradiction of democracy. However, much of its danger

⁵ See p. 672.

might be removed by a return to responsible party government and by improved methods for the consideration of minor legislation and technical problems.

Lobbying Before Administrative Bodies

In recent years there has developed a form of administrative lobby which has come about through the granting of lump sums by Congress to the President for expenditure within the states. Cities and states desiring to share in these funds have been compelled to go to the administrative agencies having the power to disburse them. The result has been a new manifestation of the lobby, with the sending of agents from these political bodies to Washington for the purpose of presenting petitions for funds. These agents are nothing less than lobbyists for the bodies they represent.

Lobbying by the Administration

Another recent and curious form of the lobby has been the activities of the Administration in pushing its legislation through Congress. It has even gone to the point of sending an agent to Capitol Hill for that purpose. He is not called that officially, of course, but is recognized as such unofficially. He is, in effect, a lobbyist for the Administration.

Public Opinion

It is evident that lobbyists do not confine their activities to direct relations with members of legislative bodies. They know that in modern governments, back of the legislatures and even back of the political parties, there is an undefined force known as public opinion, which may be an even more powerful factor in determining the course of legislation.

It may be that the term "public opinion" is a misnomer. If it means the aggregate opinion of all persons in the community upon a particular measure, we must exclude a large part of the people, for upon any particular measure it is likely that the great mass of the people have no opinion at all. Walter Lippman, in The Phantom Public, has pointed out that this public is constantly shifting—a phantom.

Moreover, those who have any opinion may have strong convictions or they may have only the slightest inclination in one direction or another. The decision may have been reached after the most intimate study, or it may have resulted from a single phase of the evidence as it happened to strike some personal prejudice or foible. More than this, it may be active and vociferous, evidencing itself in letters to the editor or to a member of Congress, or it may be entirely unexpressed.

Congress, or it may be entirely unexpressed.

Just what constitutes "public opinion" upon any matter is most difficult to determine. It may mean different things to different men. To the politician the measure is the number of votes it will influence. To another it may mean only informed or intelligent opinion. Ordinarily, public opinion is assumed to be synonymous with newspaper opinion. If the great mass of newspapers are united upon a matter, it is assumed that the people as a whole have this same opinion. This may largely be true. The newspapers not only reflect public opinion but also create it. Probably upon any matter about which the public is apathetic the newspapers will formulate national opinion. However, if the people are already aroused upon an issue or if their private interests are involved, the newspapers may not control their opinions. In the national election of 1936, the great mass of newspapers were critical of Mr. Roosevelt, who nevertheless was elected by a large popular majority.

The Discovery of Public Opinion

Numerous devices for discovering public opinion have come into being. One is the poll, such as that conducted before Presidential elections by the *Literary Digest*. Highly successful for a number of elections in predicting the results, it failed in 1936. It is possible that this poll, adjusted to the electorate in normal elections, was unsuccessful in this election because it did not reach classes that ordinarily have no incentive to vote. It was taken on the wrong side of the railroad tracks. Other polls, using smaller numbers of voters, but following different methods of distribution, are being experimented with. In some instances these are used to determine the opinions of voters upon single is-

sues, not merely upon candidates. Obviously, polls upon single issues, if successfully carried out, would be more indicative of public opinion than polls upon candidates. Even an election is not a good means of discovering opinions upon issues, for after a candidate has been elected even by a large majority, we do not know whether this came about because of his opinions upon social reform, or because he is a good fellow, or because he has advocated lower taxes. He has received a general endorsement, but we know little of a specific nature concerning the opinions of the voters upon the public questions discussed in the election.

In all probability, the great political machines have the most effective means of following the currents of public opinion. With workers stationed in each precinct who know the personal inclinations of each voter, the central offices of the party may receive reports from every locality not only upon the present opinions of the electorate but upon tendencies in opinion and upon the degree of emotion involved in the voters' reactions to public questions. The predictions of the chairman of the Democratic National Committee in 1936, with one of the most widespread political machines the country has known, were accurate to a surprising degree, and while some of this accuracy may have been the result of chance, it is more likely that it was built in large part upon accurate information not possessed by those in charge of the numerous polls which were being conducted at the time.

Politicians are known to pay considerable attention to their incoming mail for indications of changes in opinion. This, however, is most useful when the letters are spontaneous expressions of opinion. If they are the result of the activity of organizations, they have much less value.

It is evident that public opinion is elusive both in definition and discovery. It is constantly changing, the "public" is constantly shifting, and our means of discovering its nature have not been developed to any dependable degree.

The Creation of Opinion

Much more effective are the means of creating public opinion. The World War made clear the way in which whole peoples could be mobilized into united thought as in united action. The propaganda agent of wartime became the publicity agent in time of peace. Movie stars, circuses, manufacturing concerns, and universities, knowing the advantages of notoriety or good will, employed publicity agents under various titles. Even government departments and bureaus have set up publicity organizations, so that we have the strange spectacle of a government bureau striving to secure the good will of its "public" in order that it may go to another agency of government, the legislature, with demands for appropriations which will be used in part to employ publicity officers. The amount of propaganda work of some of the new bureaus is astounding. Through this activity they maintain their own existence or secure support in their plans for expansion. Thus, the force of public opinion receives its final recognition when government itself is concerned not merely with translating public opinion into law, but with creating a public opinion concerning itself. This may be called the latest of all governmental activities. It is becoming one of the most pervasive and may become one of the most dangerous. It is not without significance that modern dictatorships, such as those in Russia, Italy and Germany, place much reliance upon propaganda as a means of maintaining their position and authority.

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CHAPTER XXVI

Individual Rights

Both the federal and state governments in the United States are limited by specific provisions in the federal and state constitutions in their powers of control over individuals. Before reviewing the activities of these governments in relation to the problems of the present day, it is necessary to understand the limitations upon their powers, for the rights of individuals must be preserved even though legislatures or officers violating them profess to be acting for the general welfare. These limitations in most part are contained in "bills of rights" in the constitutions. While they are not uniform, they are quite similar in nature and resemble closely the corresponding provisions in the federal Constitution.

"Substantive" and "Procedural" Guarantees

The first ten amendments to the federal Constitution usually are referred to as the Bill of Rights. They were added to the original document upon the insistence of those who feared that the new government that was being created would encroach upon the liberties of individuals. The Bill of Rights is commonly said to contain "substantive" guarantees, such as the right to freedom of speech and freedom of religion, and "procedural" guarantees, such as the right to jury trial in certain cases. The distinction between "substantive" and "procedural" rights, however, is rather superficial. Some "procedural" rights, such as the right to "due process of law," have been elevated by the courts into a protection that cannot be abridged by any process, thus giving them a "substantive" character.

The States Not Affected

The Bill of Rights does not affect the powers of the states. It originated in a fear of the new central government and its lim-

itations concern that government alone. The provisions in the First Amendment concerning freedom of religion, for instance, do not prevent a state from establishing a state religion. They prohibit the federal government alone from passing laws respecting an establishment of religion or prohibiting its free exercise. This question as to whether the Bill of Rights affects the states was settled in the case of Barron v. Baltimore. There it was held that the Fifth Amendment, declaring that private property shall not be taken for public use without just compensation, did not give jurisdiction to the federal courts against state action Privately owned wharf property in Baltimore had been made inaccessible to vessels through the action of the city, which, in its public capacity, had diverted certain streams in such a way as to deposit sand and gravel near the wharf. The Supreme Court refused to pass upon the question of whether this constituted a "taking" in violation of the amendment, on the ground that the amendment did not affect the powers of a state or its subdivisions.

When later the Fourteenth Amendment prohibited the states from abridging the privileges or immunities of citizens of the United States, it was argued that the safeguards of individual rights enumerated in the first eight amendments were included among the privileges and immunities of citizens of the United States. If this was true, the Fourteenth Amendment protected these rights against state infringement. The Supreme Court, however, refused to support this contention (Twining v. State of New Jersey). On the other hand, the guarantee of due process of law in the Fourteenth Amendment does offer a protection against state action; this is often effective in preventing infringements of individual rights which are protected in the first eight amendments against infringement by Congress.¹

Religion, Speech, the Press, Assembly, and Petition

The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion,

¹ See p. 531.

or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In interpreting the guarantee of religious freedom it is important to note that it was not the intention in the Bill of Rights to introduce new principles into our law. The provisions of the first eight amendments, securing certain rights to individuals, are merely a guarantee of rights already recognized and are subject to such limitations as were understood at the time of their adoption to attach to such rights. Freedom of religion, therefore, does not carry with it the privilege of practicing polygamy under the guise of religion (Reynolds v. United States). If this were not the case, it would be possible for an individual to violate the acts of Congress or of the state legislatures at will by setting up a religious cult that placed such violations among its tenets. The true interpretation of religious freedom, so far as it is protected under the Constitution, is that it is a freedom of opinion. Actions are still under the regulatory power of Congress in that they are subject to reasonable regulations in the interest of the public welfare. Congress cannot be so arbitrary as to control the act of worship itself where it has no relation to the public welfare except as the expression of religious opinion. But the public welfare cannot be infringed under the guise of religion. An individual may be prevented from advancing a claim to supernatural powers, under the guise of religion, and using the mails for the purpose of procuring money under this claim (New v. United States). On the other hand, Congress can recognize religious tenets to the extent of granting exemption from military duties to persons whose religion forbids warfare. "Conscientious objectors" were granted such exemptions during the World War.

The privileges of freedom of speech and of the press are closely associated. They do not carry the privilege of defaming the character of others. An action for slander or libel may lie in such cases. It would not be permissible to incite a riot under the guise of freedom of speech or of the press. Obscene papers may be barred from the mails. Newspapers containing adver-

tisements of a lottery may be prohibited the use of the mails, for the federal government may refuse to lend its agencies to the accomplishment of a harmful purpose.

Freedom of the press involves not merely freedom from censorship or other direct limitations. It refers to other burdens which are not formal restrictions but which in fact are directed against free expression. A license tax of Louisiana on newspapers for the privilege of charging for advertising, measured by a percentage of gross receipts from advertising, applicable only to newspapers with a circulation of more than 20,000 copies a week, was held in Grosjean v. American Press Co., Inc., to deny due process of law, since the whole setting of this act showed that it was in fact intended to limit the freedom of expression of the newspapers. Although this case did not involve the First Amendment, the decision centered around the question of freedom of speech as a phase of due process of law.

The legality of a statement may depend upon the time and circumstances under which it is made. During the World War certain persons were charged with violation of the Espionage Act of 1917 A document had been printed and circulated denouncing conscription as a form of despotism and a wrong against humanity in the interest of Wall Street's chosen few "Do not submit to intimidation," "Assert Your Rights," it said. The power to send citizens to fight abroad was denied. Other similar phrases were contained in the circular. The defendants were found guilty and the judgments were affirmed in the Supreme Court. The opinion of the Court included this statement: "We admit that in many places and in ordinary times the defendants in saving all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done." The acts of the defendants were subject to prohibition in time of war, since they might obstruct recruiting and hinder the prosecution of the war (Schenck v. United States).

The rights of assembly and petition have not played a large part in either our legal or political history. Neither of these rights is of great importance in a country in which political liberty is general. The right of petition played a large part in English history at a time when the people could not legislate through their representatives and their only recourse was to petition the king for a redress of grievances. Thus, the right of petition was a step toward the right to legislate. However, when the petition of Parliament was transformed into a bill, the earlier procedure lost its importance.

At one time the question of the receipt of petitions by the House of Representatives acquired some considerable importance. It was John Quincy Adams, after he had been President of the United States and while he was a representative in Congress, who led the fight of the antislavery group to compel the House to receive petitions for the abolition of slavery. He held that restrictions upon the receipt of petitions for the abolition of slavery violated the Constitution. On one occasion he caused much glee among the abolitionists. He had announced that he had a petition to present purporting to come from certain slaves. There ensued acrimonious debate. Finally, Adams announced that the petition requested not the abolition of slavery but the very reverse of this. The petition was not received.

Petitions still are sent to the houses of Congress, frequently embodying the resolutions of organizations upon some pending piece of legislation. The modern counterpart of the petition, however, is a flood of letters or telegrams addressed to individual members of Congress. These frequently are identical messages sent by the members of an organization. Their purpose is to create the impression of an aroused public opinion, and they have in them more the spirit of a threat from the electorate than of a supplication from the oppressed.

The Right to Bear Arms

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." This amendment, like the others in the Bill of Rights, affects only the power of Congress, and leaves the states free to make laws upon the subject within their own jurisdictions. Moreover, Congress is free in governing the territories and the District of Columbia to prohibit the carrying of concealed weapons.

The Quartering of Soldiers

The Third Amendment, to the effect that, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law," is an echo from the Colonial grievances against the English government. It has been of little significance since it was placed in the Constitution.

Unreasonable Searches and Compulsory Incrimination

The Fourth Amendment also is traceable to a Colonial grievance—unreasonable searches and seizures, especially the "writs of assistance," or general search warrants. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This article has been so often interpreted in conjunction with that part of the Fifth Amendment that reads, "No person . . . shall be compelled in any criminal case to be a witness against himself. ..." that the two should be studied together. Where a person has been accused of crime and evidence has been obtained against him by an illegal search of his premises in violation of the Fourth Amendment, the courts have treated this as also a violation of the prohibition against compulsory self incrimination in the Fifth Amendment.

Immunity from self incrimination is subject to some limitations. For instance, if the witness should waive his privilege and give part of the testimony, he cannot stop with that, but must go on and give the whole of the testimony. Moreover, if the statute of limitations has run against the crime, the witness must testify, for he is no longer subject to punishment. The mere fact that the testimony would tend to disgrace the witness will seldom be accepted as an excuse, for the prohibition applies only to evidence that would incriminate, not merely disgrace, him. If the witness has been pardoned, or has been granted an immunity from prosecution for any criminal activities that he may reveal,

he can be compelled to testify. In the latter instance the immunity must be complete and must cover not only criminal activities that may be revealed directly by the testimony but also criminal activities that might be revealed by other evidence that could be discovered from the testimony of the witness (Brown v. Walker). An officer in a corporation cannot refuse to give testimony and to produce papers of the corporation on the ground that it might tend to reveal criminal activities of the corporation. The corporation, an artificial person, is not protected by the prohibitions of these clauses, except that it is protected against such searches and seizures as are unreasonable. For instance, it might be held to be unreasonable to require it to produce an enormous quantity of books and papers, perhaps causing a temporary suspension of its business, when there was no good reason to believe this sweeping order necessary (Hale v. Henkel).

If papers are obtained illegally from an office by representatives of the Department of Justice, it is not permissible for that Department after studying, copying, and photographing them to use this information as the basis for a writ properly describing the papers and calling for their production (Silverthorne Lumber Company v. United States). On the other hand, papers stolen from an office by a private individual without the knowledge of the Department of Justice, and later turned over to that Department, may be used by it, knowing that the papers were stolen, in the prosecution of a criminal case (Burdeau v. McDowall). In other words, the Department of Justice may not use papers stolen by its agents or representatives, but it may receive and use papers that have been stolen by others. Although the United States is thus the receiver of stolen goods, it is not prevented from using such goods in a criminal action against the person from whom they were stolen.

Prohibition under the Eighteenth Amendment led to some interesting questions concerning search and seizure. The use of the automobile in connection with violations of the act made a strict application of the old rules concerning search and seizure inconsistent with enforcement of the law. The great mobility of the automobile makes it almost impossible to secure a search warrant if a seizure is to be made. The automobile will be gone

and out of the jurisdiction of the officers before action can be taken. The Supreme Court permitted search, without warrant, of an automobile upon "probable cause," that is, where the officers had good and sufficient reason to believe that it was transporting liquor illegally (Carroll v. United States).

A close question is presented where evidence has been obtained through "wire tapping." Federal prohibition officers, operating in the state of Washington, gathered evidence against a gang of bootleggers by inserting small wires along telephone lines and connecting them with apparatus so as to permit the officers to listen to conversations of members of the gang over the lines. The "tapping" took place outside the premises of the criminals. The evidence was gathered over a period of nearly five months and disclosed a conspiracy on a large scale to violate the prohibition laws, involving the employment of not less than fifty persons and the use of two seagoing vessels and smaller coastwise vessels. Wire tapping was a crime under the laws of the state of Washington. Thus, the federal officers had violated state law in securing the evidence The Supreme Court, in a five-to-four decision, held that this method of obtaining evidence did not violate the prohibitions of the Fourth and Fifth Amendments. According to the majority opinion, "A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore" (Olmstead v. United States). Subsequent to this decision the Communications Act prohibited the unauthorized interception of messages by wire and the Supreme Court interpreted this to prohibit the use of testimony obtained by wire tapping (Nardone v. United States).

It should be added that the Supreme Court has held that officers may not seize, even under warrant, papers or other effects of evidential value only. There must be some right to them by the government or the complainant other than their use as evidence. Illicit liquor, for instance, may be seized, since it is in itself illegal. Papers that might be used later in a plan to defraud the government may be seized. But papers that merely have value

for convicting the owner of a crime cannot be seized (Gouled v. United States).

The Grand Jury, Double Jeopardy, Due Process of Law, and Eminent Domain

The Fifth Amendment reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The term "infamous crime," as used in the Constitution, has not been defined by the courts, but it has been treated as if it were synonymous with "felony." The statutes have defined felonies as offenses punishable by death or imprisonment for a term of over a year. The latter punishment in practice means imprisonment in a penitentiary. Offenses with a smaller penalty are classed as misdemeanors and imprisonment takes place in the local jail. In American law, then, an infamous crime is one subject to an infamous punishment, as described above. It is not necessary that the criminal be sentenced to the penitentiary. It is enough that the crime should be such as to permit such punishment (Mackin v. United States). Such crimes call for action by a grand jury.

The provision against double jeopardy not only protects the individual against a second punishment, by fine or imprisonment, for a crime but also protects him from a second trial for the same crime. The weight of authority indicates that when a person has been regularly charged with a crime before a competent tribunal, he has been placed in jeopardy (Kepner v. United States). A person who has been charged with a crime may after trial be charged with another offense alleged to have been committed by

the same act, although there is not complete agreement as to what constitutes another offense under these circumstances. Moreover, one who has been tried and punished in a federal court may later be tried and punished in a state court for the same act. For instance, passing counterfeit money may be a crime by both federal and state law. One who passes a piece of counterfeit money will in such case commit by one act a crime against both the United States and the state. He may be punished for both crimes (Moore v. Illinois). Where a jury has failed to agree upon a verdict, it is not double jeopardy to order a new trial (United States v. Josef Perez).

When a person has been convicted in a lower court, takes an appeal, and is granted a new trial, he waives his claim of double jeopardy. Not only can he be tried again but he can be convicted of an offense of a higher degree. For instance, one who has been found guilty of manslaughter may, on appeal, be granted a new trial and convicted of murder.

On the other hand, the prosecution cannot, of course, appeal

On the other hand, the prosecution cannot, of course, appeal from a verdict of acquittal, provided the case was within the jurisdiction of the court that tried it.

The prohibition against self incrimination has been discussed in connection with the Fourth Amendment and the provision concerning due process of law will be discussed separately.²

The clause providing that when private property is taken for public use there must be just compensation, constitutes a limitation upon a power that any sovereign would be presumed to possess. This is the power of eminent domain, or the right to take private property for public use. The clause places a condition upon the exercise of this power, that is, that there must be just compensation. The consent of the state within whose borders the property lies is not necessary. Where part of a tract is taken, the federal government may subtract from its payment of compensation any special and direct benefits that may come to the remainder of the tract. Where injury has been caused to the remaining part, this also is a "taking" within the meaning of the term and must be compensated for. Special and direct bene-

² See pp. 516, 531

³ See p. 257

fits may be subtracted from the total paid by the government for the property appropriated and the part that was injured. In the states, where similar constitutional restrictions also are found, there is much variation as to whether benefits may be set off against losses, varying from Mississippi, where no benefits may be set off, to some states that permit not only special but also general benefits to be set off from losses (Bauman v. Ross). It is not necessary that land be appropriated to constitute a "taking." For instance, where land has been permanently inundated through back water from a dam, compensation must be made (Pumpelly v. Green Bay Company). Where, however, the injury is merely consequential, there is no "taking." For instance, where works have been built in a river merely to prevent further erosion, and an owner who had formerly been able to flood and drain his land by means of flood gates is now prevented from doing so, he cannot claim that there has been a "taking." His injury is merely an incidental consequence of the erection of the works. He has no claim to "the unrestrained operation of natural causes" (Bedford v. United States).

Where Congress is exercising directly the right of eminent domain, its power is interpreted broadly. For instance, property may be appropriated on the site of a famous battle, for the purpose of establishing a memorial park. This is justifiable under the war power, since the battlefield might be preserved both to provide lessons in the art of war and to encourage patriotism (United States v. Gettysburg Electric Railway Co.). The power may be delegated to corporations that are of a quasi-public nature, such as railroads. In such cases, however, the courts will not give so broad an interpretation to the power. Purely private concerns cannot be invested by Congress with the power to take private property.

While the provisions of the Fifth Amendment do not apply to the states, nevertheless the Fourteenth Amendment, prohibiting a state from depriving a person of property without due process of law, is sufficient to prevent a state from taking property for public use without just compensation (Chicago, Burlington, and Quincy Railroad Co. v. Chicago).

Criminal Trials

The Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The right to jury trial secured by the Sixth Amendment no doubt is limited to those who, by the Fifth Amendment, are entitled to the indictment or presentment of a grand jury. It does not apply to the trial in military courts of persons attached to the army, the navy, or the militia in active service (Ex parte Milligan). The indictment must state clearly the offense with which the individual is charged.

A person who is brought before a court for violation of an injunction is not entitled to jury trial under this amendment, since the injunction is an equity writ and juries are not used in equity cases.⁴

The jury called for in the Sixth Amendment must be the common law jury of twelve men with a unanimous verdict. In Thompson v Utah, a person was accused of having stolen a calf in the territory of Utah, and was charged with grand larceny. After trial in the territorial courts, he was granted a new trial. Meanwhile, the territory had become a state, and the laws of the state of Utah permitted a jury of eight in such cases. The Sixth Amendment, of course, does not apply to a state. However, it was held that in this case the accused was entitled to a jury of twelve, since to try him before a smaller jury would be an expost facto proceeding.

In connection with the Sixth Amendment, it should be noted that Article III of the original Constitution provides that all trials, except in cases of impeachment, shall be by jury and in the state in which the crime was committed, except that when not committed within a state, the trial shall be in such place or

⁴ See pp. 359, 523

places as Congress may by law have directed. The Sixth Amendment makes the additional provision that the trial take place in the district, previously ascertained by law, in which the crime was committed.

The provision to the effect that the accused is entitled to be confronted with the witnesses against him does not preclude the admission of the declaration of a dying person, since that was permissible before the amendment was adopted. Neither does it apply to cases of contempt of court.

Civil Suits

The Seventh Amendment reads: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Either party in a suit at common law, involving more than twenty dollars, may demand a jury. It will be noted that the amendment covers only suits at common law and therefore does not affect proceedings in equity. There is no right to a jury trial in equity cases, and in such cases all questions, both of law and of fact, are decided by the court.⁵ Neither does it apply to admiralty cases.

The jury must be the common law jury of twelve persons with a unanimous verdict before a judge competent to advise them on the law and the facts and to set aside the verdict if it is against the law and the evidence.

The facts as determined by the jury may not be re-examined except according to the rules of the common law. The common law permits such re-examination only through the granting of a new trial for errors in law made in the trial court.

Bail and Punishments

The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

⁵ See pp 359, 522

The amount of bail that may be required is determined by two factors, the ability of the prisoner to provide the bail and the seriousness of the offense. It cannot, therefore, be a fixed amount but must be determined by the circumstances in each case. Fines must be laid only according to the seriousness of the offense.

The mere fact that a punishment is unusual is not sufficient to bring it within the prohibition, for otherwise new and more humane punishments could not be used to replace those now in existence. Neither would "cruelty" alone be a bar, for all punishment may be considered cruel, even though necessary. "Cruel and unusual" is to be construed as a single phrase, and is interpreted in the light of history and the ideas of the time. A return to the rack of the Middle Ages would no doubt be barred at the present time. Hanging is permissible, since it has been a common punishment for a long period and is not shocking to the ideas of punishment of the present time. Electrocution, when introduced, was unusual, but it was held not "cruel and unusual" within the Constitution (In re Kemmler).

A punishment that is valid for one crime is not necessarily valid for another. The penalties fixed in the law may not be severe out of all proportion to the seriousness of the offense without falling within the prohibition (Weems v. United States).

The Ninth and Tenth Amendments

The Ninth and Tenth Amendments do not deal with specific rights of individuals. The Ninth Amendment reads: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Ninth Amendment lays down a rule of construction. After having enumerated certain rights of individuals in the first eight amendments, the ninth appears to have been added to make it clear that these, and other rights protected elsewhere in the Constitution, were not necessarily a complete enumeration of the

individual rights that could not be abridged by the federal government.

The Tenth Amendment also sets forth a rule of construction, that is, that the federal government is to possess only such powers as are delegated to it by the Constitution. No doubt the courts would have held to this principle even without the Tenth Amendment. It is significant that the Constitution uses the term "delegated," while the Articles of Confederation, in a similar clause, used the term "expressly delegated." The Articles thus were more restrictive of the powers of the central government, since the federal government under the Constitution possesses not only the powers expressly granted but those reasonably to be implied from these.

The phrase "or to the people" in the Tenth Amendment may reflect the political theory of the times that assumed the existence of certain "natural" rights which were reserved to the individual and were not subject to control by any government. This principle is not accepted now. The prevailing doctrine holds that, as a matter of law, there are no "rights" possessed by the individual that are not subject to control, although there may be privileges that *should* not be controlled by law.

The Waiver of Constitutional Guarantees

Sometimes the question has arisen as to whether Constitutional guarantees may be waived by the defendant. In civil suits there is no question that the right of jury trial may be waived. A more difficult question arises in a criminal case where the accused attempts to waive some Constitutional guarantee. The state courts have not been in agreement upon this matter. Some have held that the guarantees are for the protection of the accused and that therefore they may be waived by him. Other courts have held that both the accused and the state are interested and that the guarantees may not be waived. In the federal courts it appears that the right to a jury trial may be waived in the trial of misdemeanors. In the trial of felonies there is more doubt as to the effect of a waiver in respect to a jury. However, where one of the jurors became incapacitated

during the trial of a felony, and consent to continue with the trial was given both by the defendant and the government and this was sanctioned by the court, the waiver was sustained in the Supreme Court. However, it was pointed out that departures from the jury of twelve must be based upon sound reasoning, with caution increasing with the gravity of the offense (Patton v. United States). The presence of the accused may not be waived in the trial of felonies.

The Writ of Habeas Corpus

The restrictions of the federal Constitution in the interest of the individual are not limited to the amendments. Within the body of the Constitution there are a number of important limitations upon governmental action.

In Article I, Section 9, the federal government is prohibited from suspending the writ of habeas corpus unless the public safety requires it in cases of rebellion or invasion. The habeas corpus is a writ issued by a court to anyone who is holding a person in custody, ordering that the detained person be brought before the court. He is then given a preliminary hearing to determine the legality of his detention. If it appears that the detention was entirely illegal, the prisoner may be released. If there are grounds for holding him, he may be placed on bail to await trial, or, in extreme cases, may be returned to custody until time for trial. In Ex parte Merryman, Chief Justice Taney held that the writ of habeas corpus could not be suspended by the President unless he were authorized by Congress to do so.⁶

Bills of Attainder and Ex Post Facto Laws

Again, in Article I, Section 9, bills of attainder and ex post facto laws are prohibited to the federal government, and in Section 10, this prohibition is applied to the states. A bill of attainder is a statute imposing penalties upon an individual without a judicial trial. It is, in fact, a specific kind of ex post facto law.

An ex post facto law, within the meaning of the Constitutional

⁶ See p 143

prohibition, is a retroactive criminal law which works necessarily to the disadvantage of the accused. The term does not include retroactive civil statutes. An ex post facto law is one that makes an action criminal that was not criminal when committed, or makes the crime a more serious one than it was when committed, or inflicts a greater punishment, or so alters the rules of evidence as to make conviction easier (Calder v. Bull). However, a mere change in the rules of evidence that does not work necessarily to the disadvantage of the accused is not ex post facto (Thompson v. Missouri).

The Obligation of Contracts

The federal Constitution contains one important limitation on the states that is not imposed upon the federal government. This is the provision in Article I, Section 10, prohibiting the states from passing laws impairing the obligation of contracts. Thus, a state may not pass a bankruptcy law applying to past debts, since such a law would impair the obligation of the contracts involved in such debts (Sturges v. Crowninshield). In one important decision (Dartmouth College v. Woodward), the Supreme Court held that the charter of a private corporation, Dartmouth College, was a contract within the meaning of this clause, and thus an act of the state which had attempted to alter the charter was invalid. This principle, that the charter of a private corporation is a contract, the obligation of which may not be impaired, might have become embarrassing had the court not later have restricted its implications. With the great growth of corporations in a later period and the profligacy of legislatures in granting broad and exclusive rights to them, it would have been unfortunate if these charters had been held completely inviolate. Therefore, a number of principles limiting the implications of the Dartmouth College Case were applied by the courts. One of these was that special privileges in a charter were to be construed strictly against the company. Thus, where a bridge company had been incorporated and authorized to build a bridge between two points, the state was not prevented from authorizing another bridge to be built a few rods distant and parallel with the first

bridge. The court would not read into the charter of the first company an exclusive right to build a bridge in that vicinity (Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge). Another principle of the courts is that where a charter has granted immunity from the exercise of a governmental power such as that of taxation or rate regulation, such immunity is not, in general, transferable unless specifically authorized by the legislature. Still another principle is that property owned by a chartered company is subject to the power of eminent domain, that is, the right of the state to take private property for public use. There must be fair compensation in such case, however, in order to satisfy the requirement of due process of law.7 Even more important than this, however, is the principle that in the exercise of its police power 8 the state may interfere with the operations of a company under its charter, and in this case there is no need of compensation. This principle results from the doctrine that the state cannot part with the right to protect the public health, safety, and morals, and the charter could never have contained an exception from the police power. Thus, where a fertilizer manufacturing company had been incorporated, the state was not prevented later from authorizing the village in which the company was operating to pass an ordinance prohibiting the transfer of slaughter house offal through the village. Although this ordinance interfered with the exercise of a charter right, it was valid (Northwestern Fertilizer Company v. Hyde Park).

Charters of incorporation now customarily contain a clause by which the state reserves the right to make alterations, and such reservations are valid. The charters of public corporations, that is, public bodies such as cities, are not protected by the contracts clause, but are subject to change by the legislature.

Other Individual Rights

There are other provisions of the federal Constitution that operate directly or indirectly to protect individual rights. Such are the limitations upon the exercise of the taxing power and the

⁷ See Chapter XXVII

⁸ See Chapter XXVIII.

prohibition upon the states in the Fourteenth Amendment from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States. These limitations are discussed elsewhere.

State Bills of Rights

While the federal Bill of Rights operates only as a limitation upon the federal government, state constitutions customarily carry similar limitations upon the state governments. These state Bills of Rights follow the federal model fairly closely and accomplish much the same purpose. It should be noted also that the limitations of the Fourteenth Amendment, later to be discussed, apply to the states and serve to guarantee against state infringement at least part of the rights protected by the first eight amendments against federal infringement.

The Thirteenth Amendment abolished slavery and involuntary servitude. This amendment is self executing in that it does not require supplementary legislation to carry it out. The courts have held that the amendment prevents the enforcement of contracts for personal service. Where an individual has agreed to perform personal services, he may be liable in damages for breach of his contract, but he cannot be compelled actually to perform the labor or service, nor can he be placed in jail for failure to do so. As an example, a baseball player who has agreed to play throughout a season could not be compelled to play, although he might be liable in damages for breach of his contract.

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⁹ See Chapters XI, XII, and XIX.

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CHAPTER XXVII

Due Process of Law

Comparatively Recent Development

The Fifth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law. This prohibition, of course, applies only to the federal government. However, the Fourteenth Amendment, adopted in 1868, lays down the same limitation upon the states. For a long period the courts seemingly failed to realize the possibilities that lay in the magic phrase "due process of law." It was not until some years after the adoption of the Fourteenth Amendment that it acquired any great importance, but very soon it became the chief weapon of the courts in nullifying legislation not only of the states but of the federal government. It means the same thing in both amendments and constitutes the same protection against one government that it does against the other.

Origin

Much has been written about the origin of the phrase. In an early opinion (Murray's Lessee v. The Hoboken Land and Improvement Co.), it was traced backed to Magna Charta, and was held to carry the same meaning as "the law of the land" referred to in that document. Lord Coke was quoted in substantiation of this theory. It became the accepted doctrine of the courts, although modern writers are inclined to question the correctness of Coke's conclusion. There is no settled definition of due process and each case is determined upon its own merits, but since it is assumed to have such ancient origins the historical method has played a large part in determining whether any particular act or process is "due process" or not. The common and statute law of England before the settlement of the colonies is ex-

amined frequently in cases that involve questions of due process.

This does not mean, however, that because any particular procedure was or was not the accepted law of England, the courts of the United States will be bound thereby. It is recognized that new concepts and differences in modern conditions may necessitate modifications of the English rules, even though essential principles are followed.

Its Substantive Application in the United States

In one very important particular "due process of law" has acquired in the United States a new application and it is this new application that has given it the great significance that it has in our constitutional system. In the United States an act of a state legislature or of Congress may be declared not to be due process. We have no record to show that a statute of the British Parliament has ever been declared invalid by a British court. The restrictions of Magna Charta have, in England, applied to the king but not to the legislature. "The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; . . . the omnipotence of Parliament over the common law was absolute, even against common right and reason" (Hurtado v. California).

The significance, then, of "due process of law" in America comes from the fact that it constitutes a restriction upon the legislature, and from the additional circumstance that the phrase has no exact definition. As a result, the American courts have exercised a broad and indefinite power, the limits of which they reserve to themselves to declare, to nullify the acts of every legislative body in the country from Congress down. No act of a state, even though it may have been framed to meet the tenets of the most enlightened social and economic ideas of the times, can call itself safe until the courts have held it to be in accord with due process of law.

It will be observed that the effect of this principle is to hold

that there are certain things that cannot be done by any process (except by amendment of the Constitution of the United States) without conflicting with the inhibitions of "due process of law." "Due process," then, has ceased to be a process and has acquired a substantive nature.

Natural Justice

In some early decisions it had been suggested that a legislative act would be void if it was in conflict with the principles of natural justice. To take property from one man arbitrarily and give it to another, for instance, would be a violation of natural law, and a legislative act attempting to do so would be void. As late as 1874, the case of Loan Association v. Topeka was founded upon doctrines of natural justice. Today, the decision would no doubt be the same, but the basis would be a violation of due process of law. Thus, due process of law is the modern equivalent for natural justice. It has taken the place of those "natural laws" that were assumed to exist in the now rejected contract theory of the state.

No Precise Definition

The courts have never given a definition of "due process of law." It would be impossible for them to do so. It applies to too great a variety of situations to be capable of definition and, moreover, is negative rather than positive in its effect. In any given situation there are many procedures that might be due process of law and only those procedures that are not due process are prohibited. The courts work out the meaning of due process in the cases as they arise.

Frequently, Daniel Webster is quoted upon the meaning of the phrase: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules that govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."

¹ See p. 382.

The Subjects of Due Process

Due process of law must be granted to everyone. It applies to aliens as well as to citizens. It is not merely one of the privileges of citizenship, but is applicable to everyone who comes within the jurisdiction of the national, state, or local governments. Corporations even, which are purely artificial persons created by law, are protected under this provision.

The protection does not apply merely to acts of the legislature, but to the procedure of the courts, and to administrative actions. Where a judge excludes colored persons from juries because of their race, a colored person tried before such a jury is deprived of due process (Ex parte Virginia).

It applies to everyone whom the laws may reach, or who is subject to the jurisdiction of the courts, or who may have contact with the processes of administration, whether national, state, or local.

Broad Interpretation

Its terms have been interpreted broadly. The phrase "life, liberty, or property" applies to freedom from bodily punishment, the right of employment, and the right to make contracts, as well as to the mere right to life itself, freedom from physical restraint, or the right to acquire and retain property. In general, it protects us in all those things that are regarded as contributing to well-being. In any case, however, these rights may be restricted by any state action that may be considered by the courts to be due process. They may not be enjoyed by us indiscriminately, for it is "due process" to restrict their improper exercise.

DUE PROCESS IN PROCEDURE

The Influence of Custom

There is no fixed procedure, either in criminal or civil matters, that constitutes due process of law in the trial of cases. A procedure that has been sanctioned by practice probably will be accepted as due process by the courts. This, however, does not prevent the introduction of new procedures if they are de-

signed to provide justice and are not so constituted as to discriminate against the accused. "A process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law" (Hurtado v. California).

Self Incrimination

Exemption from compulsory self incrimination is not necessary to due process. This was held in Twining v. New Jersey, where the state law had permitted the jury to take into consideration, with a possible inference of guilt, the fact that the accused did not go upon the witness stand in his own behalf. Most state constitutions as well as the federal Constitution protect the accused from self incrimination. Without passing upon the question of whether the New Jersey law actually violated the principle of exemption from self incrimination, the Supreme Court held that even though it did there was no denial of due process of law by this procedure.

The Grand Jury

The state of California permitted the substitution of an "information" in place of an indictment by grand jury in criminal cases. Instead of bringing an accusation before the grand jury which then might bring in an indictment, the district attorney could bring the accusation directly to the court. It was argued that the historic process of indictment by grand jury was essential to due process of law in criminal cases. The Supreme Court held, however, that the California law did not deny due process of law (Hurtado v. California).

The Petit Jury

Even where state constitutions require trial by jury, it has always been recognized as permissible to try petty criminal cases without a jury.

If a colored person is tried by a jury from which colored persons have been excluded because of their race either by statute

or by action of the trial judge, there is denial of due process of law (Strauder v. West Virginia; Ex parte Virginia).

A Matter of Essence and Not Mere Form

If a statute in its practical effect denies access to the courts, it may be held to deny due process. Where rates have been fixed for a public utility and the penalty for departures therefrom has been made so severe and out of proportion to the nature of the offense as to intimidate the company or its officials from resorting to the courts to test the validity of the rate, it has been held that this is the same as though the law prohibited resort to the courts (Ex parte Young).

In interpreting the due process clause the courts are concerned with the essence and not the mere form. At least in capital offenses, the accused is entitled to counsel, and this means that the court must assign counsel where the defendant is unable to employ such. Moreover, the assignment must not be merely proforma. In the Scottsboro case of Powell v. Alabama, the Supreme Court held that due process of law had been denied when certain Negroes, accused of a capital crime, were not given adequate time for consultation and to prepare a defense after a lawyer with definite responsibility for the defense had been assigned.

Manor Cases

However, in minor cases, the procedure may be administrative and summary in nature. Acting under a law of the state of New York, a game protector seized and destroyed certain fish nets that were being used in violation of the law. The owners brought an action on the ground that the nets had been destroyed illegally, since there had been no judicial proceedings. The Supreme Court upheld the action of the game warden and in the opinion said: "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or

abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. . . . To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. . . . It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property 1s of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room" (Lawton v. Steele).

Administrative Hearings

In civil cases, also, due process permits a wide variation in procedure. In fact, the adjudication need not necessarily be by a court. Moreover, the hearing may be summary in its nature. In the assessment of taxes, for instance, it is necessary that the individual be notified and that he be given a hearing before the proper officials, but it is not necessary that he be provided with a hearing before a court. Administrative officers must be given a discretion in many matters, even where individuals are involved and where their decisions partake somewhat of the nature of judicial proceedings. The courts have neither the time nor the technical information necessary to review these decisions. They must accept such decisions as due process except where injustice may result.

The Determination of Citizenship

Even determination of the citizenship of a person who alleges that he is an American citizen may be left to an administrative official without appeal to the courts. Ju Toy, a person of Chinese descent, was refused admission to the United States by the immigration officers of the port of San Francisco on the ground that he was not a citizen of the United States. He asserted that he was born in this country and therefore was a citizen. There was no doubt that if he was born in the United States, he was a citizen. The matter for determination was the question of fact as to whether he was or was not born in the United States. An appeal from the decision of the collector was taken to the Secretary of Commerce and Labor, who affirmed the decision of his subordinate. Ju Toy appealed to the United States District Court for a writ of habeas corpus and it held that he was a native-born citizen. The decision was appealed to the Circuit

Court of Appeals, which then certified certain questions to the Supreme Court for determination. In passing upon these questions, the Supreme Court took the position that the act of Congress making the decision of the immigration officials final and conclusive was valid, in the absence of proof that the officials acted in a discriminatory way. The Court pointed out that Ju Toy, while physically within the boundaries of the United States, was to be regarded legally as still just outside the limits of the United States waiting to be admitted. The effect of the decision was to hold that, at least in the absence of discrimination or obvious injustice, the decision of an administrative officer is final upon the citizenship of a person arriving in this country from abroad (United States v. Ju Toy). The case is a rather extreme example of an administrative decision treated as conclusive by the courts and yet holding against the claim of a fundamental right.

DUE PROCESS AS A SUBSTANTIVE GUARANTEE

Rights That Can Be Taken Away by No Procedure

It is upon the substantive side that due process has received its chief and its significant development. There are certain rights which can be taken from the individual by no procedure, legislative or administrative. In Meyer v. Nebraska, the opinion of the Supreme Court reads: "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." As will become evident in the next chapter, it is the substantive interpretation of the due process clause, and particularly the emphasis upon freedom of contract, that has brought the due process clause so frequently into conflict with the police power of the states.2

² See p 553 for application of the due process clause to rate fixing.

Definiteness Required in Criminal Statutes

In criminal legislation it has been held in one case to be a denial of due process to prosecute an individual for having sold articles at a price in excess of their real value. This real value of an article was defined as "its market value under fair competition, and under normal market conditions." The International Harvester Company was charged with having entered into an agreement with other companies for the purposes of controlling the price of harvesters and of enhancing the price above their real value. The Supreme Court held that the crime was not defined with sufficient accuracy. The company could not know at any given time what was the real value of a piece of machinery. "To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess" (International Harvester Company of America v. Commonwealth of Kentucky).

Class Legislation

Class legislation, where it involves discrimination against any particular class of people, or in favor of any class of people, will be held to be a violation of due process of law, at least where no reasonable basis for the discrimination can be found.

A Negro segregation law of Louisville, Kentucky, prohibiting the residence of Negroes or whites in a block upon which the greater number of houses were occupied by persons of the other race was held unconstitutional. It annulled the right of a white or colored man to dispose of his property to one of the other race and so deprived him of property without due process (Buchanan v. Warley). It should be noted that this case dealt with a public ordinance which attempted to accomplish segregation. It did not pass upon the legality of contracts between individuals prohibiting the sale of property to Negroes, which presents a different problem. In such cases, since the

contracting parties have not been deprived unwillingly of a right, but have acted voluntarily, only the public interest is involved.

On the other hand, "Jim Crow" laws, segregating Negroes and whites on railways, have been upheld where there has been provision for substantially equivalent accommodations for each race, on the grounds of promoting the public comfort and preserving the peace (Plessy v. Ferguson) Laws that forbid intermarriage of white and colored people and laws providing separate schools for white and colored children also are permissible.

The Equal Protection of the Laws

Cases in which the due process clause is invoked may sometimes also involve a claim to equal protection of the laws under the Fourteenth Amendment. In fact, equal protection of the laws may well be considered essential to due process of law The provision in the Fourteenth Amendment against denial by a state of equal protection of the laws would appear to involve merely an emphasis upon a special phase of due process of law, as that phrase is now interpreted. The race discriminations referred to above, for instance, might involve the question of equal protection as well as of due process of law. Another example would be the graduated features of an income tax law. It has been held that an inheritance tax may be made higher for large than for small amounts received by inheritance and higher for distant relatives than for close relatives. Both these features may be included in the same act (Magoun v. Illinois Trust and Savings Bank).3

Classifications

It is not a denial of equal protection of the laws to establish classifications, provided they are based upon a reasonable distinction, even though each class is treated differently. This principle is well recognized and appears frequently in the opinions of the courts. It appears, for instance, in the case just cited, concerning a graduated inheritance tax. The various graduations, both those based upon the size of the inheritance and those based

³ See p 386

upon the degree of relationship of the inheritor, were, in effect, classifications. Since they were based upon a reasonable distinction, they did not deny equal protection. It is necessary, however, that everyone within a class be treated alike. To treat differently subjects that fall within one classification is a denial of equal protection.

Arbitrary Administration

One of the most interesting cases involving equal protection of the laws is Yick Wo v. Hopkins. The board of supervisors of San Francisco issued an ordinance prohibiting the operation of laundries in that city in any buildings other than those of brick or stone except with the consent of the board of supervisors, and prohibiting scaffolding upon roofs without permission of the board. Yick Wo, a Chinese, was refused a license to conduct a laundry in the building which he had used as a laundry for twenty-two years. He continued to operate without a license and was arrested and fined. His application for a writ of habeas corpus reached the United States Supreme Court on appeal. The evidence showed that the fire wardens had certified that the building was safe and the health officer had certified that it was sanitary. It was also disclosed that of the 320 laundries in San Francisco about 240 were operated by Chinese, and that while over 200 had made applications for licenses, they had been refused a license in every instance. Every other application had been granted with only one exception.

It will be noted that the board of supervisors could under the ordinance exercise without limitation its power to grant licenses. The act had not stated that the board might examine sanitary conditions or conditions from the point of view of safety from fire, basing its decision to grant or not to grant a license upon its investigation of these facts. In such case the board would simply have been determining whether a certain state of facts existed, with the obligation to apply the provisions of the ordinance to that situation. Actually it had been given the arbitrary power to say "Yes" or "No."

A second factor in the case was the way in which the ordin-

ance actually had been enforced. It was obvious that the board had used its authority in such a way as to discriminate against the Chinese. The figures made this clear. The act not only granted arbitrary power but this power had been exercised in a discriminatory way.

On the basis of this state of facts, Yick Wo then was released from imprisonment. The actual effect of the decision was to hold that the ordinance was invalid. The distinctive feature of the decision was the fact that the court was led to it, in large part, by the method in which the act had been enforced. Ordinarily, the constitutionality of an act will be determined on the basis of the terms of the act itself. In the case of Yick Wo, however, the terms of the act constituted only one of the factors that made the ordinance unconstitutional. The other factor, and apparently the determining one, was the arbitrary and discriminatory manner in which the act was applied. The decision shows that the manner in which an act is enforced may become an important consideration in determining whether the act itself constitutes a denial of due process of law.

There is no question that an administrative officer may be given discretionary powers in the granting of licenses. In the Yick Wo case, no doubt, it would have been permissible to give a competent board the power to examine the sanitary conditions of the premises or conditions in relation to fire, and to grant or refuse a license upon the basis of such examination.

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CHAPTER XXVIII

The Police Power

The Restrictions of the Federal Constitution

We have seen that the federal Constitution sets up many limitations upon the states in their power to deal with individuals. If such limitations were applied without restriction, the states would be prevented in many instances from taking proper measures to protect the community as a whole A state may not pass a law impairing the obligation of contracts, and the charters of private corporations have been held to be contracts within the meaning of this provision. A strict enforcement of this restriction in so far as it applies to charters might deprive the public of valuable rights.1 Sometimes the exercise of a power by the central government may involve potentially the power to limit the state in protecting its citizens. For example, under the protection of federal interstate commerce laws diseased cattle might be brought into a state to the detriment of its inhabitants. Probably the most important limitation upon the states is the prohibition against deprivation of life, liberty, or property without "due process of law." The phrase "due process of law" is indefinite and has not been, and could not be, accurately defined by the courts.2

The Public Welfare

As an offset to the various limitations upon the states, the courts have built up the doctrine of the "police power." Like "due process of law," it is indefinite and not capable of exact definition. In its classic form it was held to mean the inherent authority of the state to protect the public "health, safety, and

¹ See p 527

² See p 531.

morals." To these may now be added the public convenience and the public welfare. As "due process of law" protects the individual against action by the public through the state, the counterbalancing "police power" is the power of the public, exercised through the state government, to restrain the individual in defense of the whole. It is evident, therefore, that in cases that arise in the courts where individuals are charged with violations of law, the state will frequently attempt to justify the law as a proper exercise of the police power, while the defendant will urge that the law is invalid as a violation of due process of law. Since both the police power and due process of law are indefinite in extent and incapable of exact definition, they frequently come into conflict.

No Federal Police Power

Since the police power is an inherent power to protect the public, it is not possessed by the federal government. It is true that Congress does legislate at times to protect the public health or safety or morals, but it does so only under the authority of powers actually granted. Such laws are passed under the power to control interstate commerce, as in the case of the pure food law, or under the power to tax, as in the case of the narcotics law, or under some other granted power. The federal government has no inherent powers, and its so-called police powers, such as those involved in the legislation referred to, do not arise from any inherent "police power" but are only analgous to it. It is not the function of the federal government to protect the public health, safety, or morals. An exception arises, of course, where the federal government legislates for the territories or the District of Columbia. In such cases it functions as a state government and possesses the same inherent powers as any state government.

Possessed by the State Legislature

Within the state it is the legislature that possesses the police power, for it is the legislature that is regarded as the repository of the inherent powers of the state. Questions concerning the police power, therefore, arise in connection with enactments of the legislature.

Often Conflicts with Claim of Denial of Due Process of Law

In the chapter on due process of law, a number of the cases referred to involved a conflict between due process and the police power. In Meyer v. Nebraska,3 the purpose of the law, which was held to violate due process, was to protect the pupils from any pollution to American ideals, a danger involving the public safety. In the case of Yick Wo v. Hopkins,4 the ordinance could have been held valid only as a proper exercise of the police power. It was held invalid because it was not so framed and administered as to show that its true purpose and effect was to protect the public against danger of fire or insanitary conditions. Race discrimination could not be justified under the guise of the police power. In Buchanan v. Warley, another case of race discrimination,⁵ it was held that a Negro segregation law was not a proper exercise of the police power, but in Plessy v. Ferguson, 6 a "Jim Crow" law was upheld as designed to promote the public comfort, peace, and good order.

The Hours of Labor

The regulation of the hours of labor and of wages has been one of the difficult problems in the exercise of the police power. In the interest of the public health and well-being, and incidentally of morals, there has been much legislation of a "social" nature in regulation of labor conditions, the legal justification for which must lie in the police power. Opposed to this is the legal right of the employer and employee to be let alone and to make their own contracts for labor, the basis for which may be sought under the claim of due process of law.

The constitutional history of the regulation of hours of labor shows a gradual shift of emphasis on the part of the Supreme

³ See p 539.

⁴ See p 542

⁵ See p 540.

⁶ See p 540.

Court from the individualistic influences of due process to the "social" influences of the police power.

As early as 1898, in Holden v Hardy, a case coming from the state of Utah, a state law limiting the hours of labor to eight a day except in cases of emergency, and applying to workers in underground mines or smelters or other institutions for the reduction of ores or metals, was upheld. The principle involved was that the hours of labor under conditions especially dangerous to health were subject to reasonable regulation.

In 1905 came the case of Lochner v. New York, "The Bakers' Case," involving a section of the labor law of the legislature of New York state, limiting labor in bakeries to ten hours a day and six days a week, with provision for certain exceptions. The Supreme Court took the position that the baker's trade was not especially unhealthy or dangerous and held these provisions of the labor law unconstitutional as not coming properly under the police power. "It is manifest to us that the limitation of the hours of labor as provided for in this section . . . has no such direct relation to and no such substantial effect upon the health of the employé, as to justify us in regarding the section as really a health law." This decision evidently excluded ordinary occupations, not especially hazardous to health, from the operations of the police power, in the matter of hours of labor.

Later, in Muller v. Oregon, the Supreme Court upheld a maximum limit of ten hours a day for women working in mechanical establishments, factories, and laundries. This apparently treated all occupations involving long hours as dangerous to the health of women.

In 1917, a further step was taken and the Bakers' Case was overruled, or at least ignored, for in Bunting v. Oregon the Supreme Court upheld an Oregon law which, with certain exceptions, limited the hours of labor "in any mill, factory or manufacturing establishment" to ten hours a day. By this decision the principle that the hours of labor in ordinary occupations, even for men, are subject to reasonable regulation under the police power seems to be established, so far as the federal Constitution is concerned. While the Bakers' Case was not

mentioned in the opinion of the court in this case, it appeared that the intention was to overrule the earlier case.

It may be concluded from these cases that the Supreme Court now will uphold reasonable maximum limitations upon the hours of labor even as applied to men in ordinary occupations. The justification lies in the police power, to protect the well-being of the people. There is a direct relationship between long hours and health.

Minimum Wages

In 1923, after the decision in Bunting v Oregon, the Supreme Court was confronted with another phase of the same general problem. If the police power justifies the fixing of a maximum limit to the hours of labor, may it not also justify the fixing of a minimum limit to the wages of labor? Adkins v The Children's Hospital involved the validity of an act of Congress applying to the District of Columbia and establishing a Minimum Wage Board with power to fix standards of minimum wages for women and minors in any occupation. The Court held that this act was a violation of the freedom of employer and employee to contract with one another upon the price for which the employee should render service, and therefore a denial of due process of law. The opinion questioned that a minimum wage for women, fixed by a board, and varying between different occupations, could be directly related to health, when the income necessary to preserve health would vary so greatly in individual cases. The same lack of relationship was found in regard to wages and morals.

However, in West Coast Hotel Co. v. Parrish, the Supreme Court specifically overruled the conclusion in the Adkins case, upholding a minimum wage law for women and minors of the state of Washington. The Court found a direct relationship between wages and the health of women and considered the latter a matter of public interest.

Business Affected with a Public Interest

The question of price fixing has recently been the subject of much discussion. In the past, governmental price fixing was

limited to a definite group of activities—those affected with a public interest. The difficulty was to determine which were "affected with a public interest." Railroads and street car companies clearly belong to this group. Roads historically have been looked upon as public in nature Moreover, railroads operate under franchises granted by the state. In addition, their business partakes of the nature of a monopoly. Even though competing companies are granted franchises in the same general area, competition cannot be entirely free between roads that are not exactly parallel and do not serve exactly the same public equally well. Moreover, the nature of their business precludes the existence of many companies in one area. At the same time, the public is so dependent upon their services that even without these special characteristics they probably would be regarded as of a public nature. Cities and metropolitan areas could be destroyed by a breaking down of transportation services, and this fact should be sufficient to invest them with a public interest.

Other public utilities, such as gas and electric companies, have much the same characteristics as transportation companies. They operate under franchises, tend to be monopolistic, and provide services of vital public interest. The fixing of rates for such concerns has been considered entirely proper, since they are thought to be endowed with a public interest.

It is possible that the courts will expand the number of businesses that they consider affected with a public interest. In an emergency the courts will uphold regulations that might not be permitted at other times. Rents may be regulated temporarily as a result of conditions created by war (Block v. Hirsh). The Supreme Court has upheld the fixing of the maximum storage charges of grain elevators on the grounds that in a state in which elevators are needed to provide facilities for a great grain growing area, the elevators become affected with a public interest (Munn v. Illinois). The Court pointed out that baking, milling, innkeeping, and other occupations had in England been subject to similar regulations as to maximum charges, and that some states still had regulations upon these matters.

The most notable instance of an attempt by a state to invest ordinary private business with a public interest occurred in

Kansas. There the state declared the manufacture and preparation of food for human consumption, the manufacture of clothing for human wear, the production of fuel, the transportation of the foregoing, and public utilities and common carriers all to be affected with a public interest. It set up a Court of Industrial Relations consisting of three judges with powers to fix wages when in wage disputes it found the peace and health of the public imperiled. The Supreme Court held (Wolff Packing Co. v. Court of Industrial Relations) that the Kansas law was invalid. It did not directly hold that the businesses mentioned were not or could not be invested with a public interest, but did hold that even though invested with a public interest, the act went too far in using that as an excuse for wage fixing. Price fixing, except upon wages, was not directly involved, but the reasoning of the opinion certainly would have excluded price fixing upon the commodities produced by those industries. Of course, the services of public utilities and common carriers are subject to such price regulation.

In relation to the condition of workers in industry, therefore, it appears that reasonable maximum hours of labor may be fixed, but wages may not be fixed by the state. The prices for commodities and services are not subject to regulation, except in businesses affected with a public interest. The courts will not accept the mere declaration of a legislature that a business is affected with a public interest, and even then, where it is found to be so affected, they will not necessarily hold it subject to price regulation. Only where the public is vitally dependent upon the services of a business will the courts hold it to be subject to price regulation.

Another phase of legislative effort to expand the field of businesses affected with a public interest has appeared in licensing laws. The state of Oklahoma declared the manufacture, sale, and distribution of ice to be a public business, and required a license for anyone who should engage in such business. The licenses were to be issued by the Corporation Commission of Oklahoma, and were to be granted to a new company when a necessity for such company should be proved. The Supreme Court held (New State Ice Co. v. Liebmann) that the act was

invalid. It was admitted that certain forms of business had been regarded by the courts as invested with a public character. Grist mills, serving the public, have been in this class Irrigation might in some localities have such importance as to be invested with a public interest. Cotton gins in Oklahoma had been included, before the present case was decided, because of the great importance of cotton in that state and the relation of cotton gins to the public. The Court saw nothing, however, in the nature of the ice business that warranted a treatment different from that accorded other industries in general. The act was designed neither to protect against monopoly nor to encourage competition It did not regulate a business, but was designed to preclude persons from engaging in it. There was nothing peculiar in the business to distinguish it from other ordinary forms of manufacture and production. The case was not different from that of a dairyman who attempted under state authority to exclude new dairymen from operating, on the ground that there were enough dairymen in the business. It did not involve a natural monopoly. The enterprise involved was not dependent upon the grant of public privileges. There was no purpose in the act to protect natural resources. There was nothing in the product to distinguish the business from ordinary business. In other words, the Court found the ice business to be an ordinary business, and took the position that as such, while subject to reasonable regulation, it was not subject to the sort of control involved in the act.

However, in Nebbia v. New York, the Supreme Court subsequently upheld an act of the State of New York which set up a Milk Control Board with power to fix maximum and minimum retail prices on milk. The Court admitted that the dairy industry was not in the accepted sense a public utility, but pointed out that there was no closed class of "businesses affected with a public interest" which meant in fact "subject to control for the public good." In the present instance, destructive price cutting was endangering the dairy business, which was supplying a commodity needed by the public. The present regulations were not arbitrary or unreasonable so as to constitute a denial of due process of law. Thus, a business usually not regarded as "affected

with a public interest" was, at least under the unusual circumstances of this case, held to be within the class so affected with a public interest as to be subject to a price-fixing measure.

Limited by Requirement of Due Process of Law

Even though a business clearly is affected with a public interest it is not subject to arbitrary regulation by the state under the guise of the police power. There is no phase of business more clearly affected with a public interest than is transportation. Railroads are without question subject to governmental regulation, and yet an arbitrary regulation will be held invalid as a denial of due process of law. The most striking application of this principle appears in rate fixing. The rates charged by carriers for the transportation of goods or persons are unquestionably subject to regulation. If, however, these rates are made so low as to deny a reasonable return to the carrier, the regulation will be held invalid as a denial of due process of law (Smyth v Ames). Just what constitutes a fair return is not clearly determined. "A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally" (Bluefield Water Works & Improvement Co. v. Public Service Commission). Perhaps six or eight per cent upon the valuation of the property of the carrier would be a reasonable percentage. One of the difficulties in such cases is to determine upon the proper valuation for the property, since there is much room for dispute upon the method to be followed.

Zoning Laws

Another problem created by modern conditions has been in relation to zoning laws and laws regulating billboard advertising. The courts have been reluctant to include esthetic considerations within the scope of the police power. A leading case involved a zoning ordinance of the village of Euclid, a suburb of Cleveland, Ohio. The ordinance divided the municipality into six "use" districts, classified according to the use to which they were to be put. One was restricted to single-family dwellings and certain

other uses; a second added two-family dwellings to the types permitted in the first district, a third added apartment houses, hotels, and certain other similar buildings; a fourth added such buildings as banks, offices, and retail stores; a fifth added warehouses, certain types of manufacturing plants, and similar businesses, and a sixth included gas works and some other types of plants A seventh class of users was prohibited altogether. There were three height districts in which buildings over a fixed height were prohibited, with such exceptions as church spires and water tanks. There were four area districts with provision for the size of lots in each district. The ordinance contained regulations also upon the width of lots, the use of signboards, and other matters (Village of Euclid v. Ambler Realty Co). The ordinance was upheld by the Supreme Court as an exercise of the police power. The Court took the position that zoning aided in the prevention of injury to children and others, the prevention of disorder, extinguishment of fires, and promotion of health. It was also pointed out that the construction and repair of streets was rendered easier and less expensive by confining the greater part of the heavy traffic to certain streets. These arguments appeared to be the basis for the position of the Supreme Court, although the primary purpose of zoning laws probably is the protection of property values, considerations of an esthetic nature, and considerations affecting the comfort and peace of mind of residents. While esthetic considerations probably are not clearly included within the police power, the courts have shown a tendency in connection with zoning laws, and particularly in connection with billboard legislation, to recognize regulations that have an esthetic purpose.

Conservation Laws

A form of exercise of the police power that has acquired especial significance in recent times has been in connection with the conservation of natural resources. Of particular importance is the power of a state to prohibit waste in petroleum at the wells. Such prohibition is permissible not only to prevent waste in the ordinary use of the term; it may also be applied so as to prevent the withdrawal of greater quantities from a common

source than can be transported or marketed or than are necessary to meet reasonable market demands. The amounts taken from each well may be "prorated" among the wells so as to permit no one well from taking more than its just proportion. This is justifiable on the ground that because of the peculiar conditions of the industry, the excess withdrawal of oil from any one well in a particular area compels others drawing from the same pool to increase production in self-defense. The result is likely to be overproduction, with consequent wasteful methods of storage. Natural gas also is lost by such uncontrolled production. This, in turn, causes economic waste in that the remaining oil is made more difficult to obtain (Champlin Refining Co. v. Corporation Commission of Oklahoma).⁷

It does not follow that because the state may control the use of such natural resources as gas and oil, lying beneath the surface of the owner's property, it may also control such natural resources as timber, affixed to the surface of the property. The owner's control of his property, when it is in the form of a free gas or fluid, lying beneath the surface, is not so complete as it would be if it were confined and reduced to his physical control. Regulations of the state with conservation in view are more applicable to property in this free state than to fixed property on the surface of the ground.

The Public Health

One of the most obvious phases of the exercise of the police power is in relation to the public health. The discovery of germs as a source of disease, discoveries in the way of the prevention of disease, and sociological theories upon methods of improving the physical well-being of the race have created borderline cases of the exercise of the police power. Quarantine laws are permissible to exclude persons with dangerous contagious diseases from contact with healthy persons. Compulsory vaccination of the inhabitants of a town may be required, at least where there is substantial evidence that there is danger of an epidemic (Jacobson v. Massachusetts). In Buck v. Bell the Supreme

⁷ See p. 695.

Court upheld the constitutionality of a Virginia law which permitted the sexual sterilization of the inmates of certain state institutions where the inmates were afflicted with hereditary insanity or imbecility. Very careful provision, including an appeal to the courts, was made to protect the patients against the abuse of the powers granted in the law. In this case, which involved a feeble-minded woman, who was the daughter of a feeble-minded mother and the mother of an illegitimate feeble-minded child, it was held that the operation would not be a violation of due process of law and the equal protection of the laws. "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough."

Public Morals

In legislating in the interest of public morals, the police power extends to practices that are not immoral in themselves but that encourage immoral tendencies. There is nothing immoral in the playing of billiards or pool. The state may nevertheless prohibit the maintenance of billiard tables for hire, since establishments of this nature may have a harmful tendency (Murphy v. California).

Summary

The police power then is the inherent power of the state to restrict the individual in the interest of society. It may not be used arbitrarily, and is limited by other principles that safeguard the interests of the individual. Its extent and methods of application will vary with the changing needs of society. In a very broad sense, it includes all valid legislation, since it is the power to legislate in the interest of the whole.

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$$P_{\mbox{\scriptsize ART}}$\mbox{ VI}$$ THE FEDERAL AND STATE GOVERNMENTS IN ACTION

CHAPTER XXIX

Interstate Commerce

Importance of the Commerce Clause

A proper comprehension of any system of government calls for a knowledge of more than the details of its structure and of the forces that put it into action, for government is a living thing intended to meet the political problems of society. An understanding of the government of the United States, therefore, can be attained only after examining into the manner in which the federal and state governments are meeting the great issues of our age. Both federal and state activity in relation to many of these questions center around the interpretation of the commerce clause of the federal Constitution.

"The Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Article I, Section 8).

There is no single provision of the Constitution that has contributed more to the expansion of the central government than has the commerce clause. Although the need for a national control of commerce was one of the reasons for the adoption of the Constitution, the clause for many years played little part in our constitutional history. Commerce was in a comparatively simple state. A relatively small part of it was interstate, most of this was by water, and there were few legal problems involved. In fact, the jurisdiction given to the federal courts over admiralty and maritime matters, carrying with it a power on the part of Congress to issue regulations, might well have been found sufficient. It was only with the growth of railroads and the increasing complexity and volume of our interstate trade that the commerce clause acquired great importance. Today, the clause has

¹ See p 576

been so expanded by legislative and judicial interpretation that state regulation, even of local commerce, is being reduced to a minimum, while the federal government is using its control of interstate commerce as a basis for an increasing volume of laws for the regulation of American business and even for the protection of the public health and morals.

Up to 1840 only five cases involving the commerce clause had reached the Supreme Court. By 1860, they had reached a total of twenty. Even by 1890 the number was only one hundred forty-eight. The problems are now so numerous and complicated that special machinery is necessary to administer the federal regulations.

The Subjects of Interstate Commerce

The determination of what constitutes "commerce" was one of the earliest problems to confront the Supreme Court. This was one of the questions involved in the case of Gibbons v. Ogden, the first of the long series of interstate commerce cases. The state of New York had granted to Robert Fulton and Robert R. Livingston the exclusive privilege of navigating by steam the waters of that state. An assignment had been made from them to John R. Livingston and from him to Aaron Ogden to navigate between Elizabethtown, New Jersey, and New York City. Gibbons was navigating this route with steamboats licensed to operate in the coasting trade under an act of Congress. He had been enjoined by the New York courts from navigating the waters of that state in violation of the state grant. The Supreme Court held against the right of New York to grant the privilege. It had been argued that the problem involved was not a matter of "commerce," but of "navigation." In his opinion Marshall said: "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse," and this, he said, included navigation. Thus, Congress had jurisdiction, not only over the goods of interstate commerce but also over the means of transportation.

Later the question was raised as to whether Congress had jurisdiction over the transmission of intelligence by telegraph. An act of the state of Florida had granted to the Pensacola Telegraph Company certain exclusive privileges which conflicted with

the plan of the Western Union Telegraph Company to construct a telegraph line through the state to Pensacola. This grant conflicted with an act of Congress The court held the state law invalid, and, in the opinion, referring to the commerce clause and to the Congressional power to "establish Post Offices and post Roads," said: "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances" (Pensacola Telegraph Company v. Western Union Telegraph Company). The regulatory power of the federal government has in the same way been extended to the radio.

All goods transported across state lines are in interstate commerce. The fact that they are carried in the private automobile of an individual and are for his personal use does not deprive the goods of their character as interstate commerce (United States v. Simpson). In fact, the individual himself is subject to regulation under this clause.

A limitation upon the term "interstate commerce" was brought out in the case of United States v. E. C. Knight Co. There was being consummated a combination of sugar refiners, who, it was alleged, produced most of the refined sugar manufactured in the United States. It was charged that the purpose was to obtain control of the price of sugar and that the completion of the combination was a violation of the Sherman Anti-Trust Act, which had been passed under the commerce power. The Court took the position in this case that manufacture was not commerce, as manufacture merely changes the form of the goods, whereas commerce relates to sale and transportation. It should be noted, however, that the practical effect of this decision has been much mitigated by subsequent decisions which emphasize the point

that sale can be regulated Cases similar to the Knight case would now be presented as involving an effort to control interstate sales. As most manufacturers in this country are manufacturing for interstate sale, the regulatory power of Congress can now be exercised over most combinations of manufacturers. In addition, manufacture itself may be subject to federal regulation if it is part of a "flow of commerce." However, the general principle laid down in the Knight case, that manufacture is not commerce, still stands.

An attempt by Congress to regulate child labor under the commerce power has been held unconstitutional. The transportation in interstate commerce of the products of child labor was prohibited in an act of Congress of September 1, 1916, but the Supreme Court held that this act was unconstitutional, since it attempted to regulate the local industries of the states (Hammer v. Dagenhart). Thus, in this decision the Court applied the doctrine of the Knight case that manufacture is local and is not interstate commerce.

Insurance is not interstate commerce. This was decided in 1868 in the case of Paul v. Virginia, wherein the Supreme Court upheld an act of Virginia requiring the agents of insurance companies incorporated in other states to procure a license to do business in Virginia. "The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. . . . The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia." This decision has prevented the federal regulation of the insurance business.

In contrast with this decision, holding insurance not to be interstate commerce, are two cases, one dealing with lottery tickets and the other with a correspondence school. Lottery tickets, as promises to pay in a certain eventuality, have some similarity to insurance policies, but the interstate transportation of lottery

² See p 568.

tickets has been held to be interstate commerce. In Champion v. Ames it was held that the interstate shipment of lottery tickets could be prohibited by Congress. This case is to be distinguished from Paul v. Virginia in that it dealt only with the lottery tickets in so far as they entered interstate commerce. Congress could not control the lotteries themselves. Somewhat more in contrast with Paul v Virginia was the case involving a correspondence school engaged in transmitting papers, textbooks, and the like, and collecting fees and soliciting students. This was held to be interstate commerce (International Textbook Company v. Pigg).

On the other hand, a broker in bills of exchange has been held to be subject to state taxation on the ground that he is not engaged in interstate commerce, although the bill of exchange may be an instrument of interstate commerce. An analogy was drawn by the Supreme Court between the business of the broker in international bills of exchange and that of the shipbuilder. Both were supplying an instrument of commerce, but both businesses would be subject to state taxation. Neither could claim exemption from a tax upon his business merely because his products might be used in interstate commerce (Nathan v. Louisiana).

A curious exception to interstate commerce is wild animals in their natural state. The killing of wild animals is not subject to regulation under the commerce clause, although the federal government may acquire jurisdiction in certain cases under other parts of the Constitution.³ After such animals have been killed or captured, however, they are, of course, subject to the power of Congress over commerce, if transported across state lines.

The Interstate Journey

Perhaps even more difficult than the question of what constitutes the subjects of interstate commerce has been the problem of determining when an interstate journey begins and ends. In Gibbons v. Ogden it was made clear that if the journey goes across a state line, an interstate character is given to the whole

³ See p. 152.

journey, from the point of departure in the first state to the final destination. While it is the crossing of the state line that establishes the journey as interstate in nature, that part of the journey which preceded the crossing of the state line is just as much a part of the interstate journey as the part that followed the crossing of the state line. The jurisdiction of the federal government begins where the journey begins, and therefore it is frequently important to determine just where the journey began. Likewise, since the jurisdiction of the federal government ends with the end of the journey, it is often necessary to determine at just what point the journey came to an end.

The Beginning of the Journey

In general, the interstate journey begins when the goods are turned over to the interstate carrier, that is, to the express company or the railroad. In some cases, however, this criterion cannot be applied, as no carrier is involved. In Coe v. Errol, logs were cut, brought down to the bank of a river in New Hampshire, and left there waiting for a convenient time at which they were to be floated down to a point in Maine. The town of Errol levied its property tax upon the logs while they lay on the bank. The owner claimed that they were in interstate commerce. The Supreme Court held the tax valid, stating that the journey did not begin until the logs were actually started down the river on the way to their destination. The *intention* of the owner to send them down the river did not give them an interstate character.

Interruptions to the Journey

Interesting problems have arisen in connection with interruptions to the interstate journey. Another case dealing with logs can be used to illustrate this. In this case (Champlain Realty Co. v. Brattleboro), logs intended for another state had been floated down the West River, but at the junction of that river with the Connecticut River, at Brattleboro, in Vermont, the logs had been caught by a boom and retained while awaiting lower water in the Connecticut. Later the boom was cut and the logs were floated down to their destination in New Hampshire. The

town of Brattleboro levied its property tax upon the logs while they were being held at the boom. The tax was held invalid, inasmuch as the logs had been stopped merely to facilitate their safe delivery, and not for the purpose of putting them through some process. They were still in interstate commerce and not subject to the taxing power of the state.

The End of the Journey

Even more difficult has been the problem of determining what constitutes the end of the journey. In general, it can be said that the jurisdiction of the federal government ends and that that of the state begins when the goods become commingled with the goods of the state. The problem is to determine when this commingling has taken place. One principle applied by the courts is that when goods brought from another state have been resold by the importer they lose their interstate character and become commingled with the goods of the state. It does not follow, however, that the goods remain in interstate commerce until resold. They may have been removed from the original package in which they were packed when they were shipped. In this case, the "original package doctrine" may apply, that is, the goods became commingled with the goods of the state when the original package is broken. This principle is sometimes referred to as though it were an absolute and invariable rule. As a matter of fact, since it is merely a measure for determining whether the commingling with state goods has taken place, the original package doctrine is not always strictly adhered to. For instance, when the state of Tennessee passed a law prohibiting the sale of cigarettes, certain manufacturers shipped them to dealers in that state, not in large cartons but in small packages, each containing ten cigarettes, in which they were to be retailed. It was argued that until this package was broken they were not subject to the state law. However, the Supreme Court evidently regarded the use of small packages as an attempt to evade the law, and based its decision upon the theory that the "original package" was the carton in which cigarettes customarily are shipped to retailers. The small packages were subject to the state law (Austin v. Tennessee).

Another limitation on the original package doctrine is in regard to the taxing power of the state. Even though the goods are in the original unbroken package in which they were shipped, if they have come to rest in the state, and if the tax is a regular tax of the state, is reasonable, and does not discriminate against the goods of interstate commerce, such tax is valid (Woodruff v. Parham). The goods must have come to rest. A good example would be goods that have reached the consignee and have been stored in a warehouse. The tax may not be discriminatory against the goods of interstate commerce, for by the very process of discrimination the law would single out the goods of interstate commerce from the rest. In that case it could hardly be said that such goods were commingled with the goods of the state. The tax must be reasonable, for otherwise it would be a burden upon interstate commerce and therefore invalid.

In the case of Brown v Maryland, it was held that if such goods had been imported from abroad, a state tax would not be valid, since it would be a tax upon imports. In the opinion in this case, the Court also said that the commerce clause would be violated by such a tax, but this part of the opinion is overruled by Woodruff v. Parham.

Even the principle that resale brings the interstate journey to a close seems to have been abandoned in the decision upon the constitutionality of the federal Packers and Stockyards Act of 1921. Cattle are shipped from various states to stockyards in Chicago and other cities in enormous numbers, taken from the cars, slaughtered, and the meat packed and shipped on to other states. In addition to this, they pass through the process of resale. The number shipped from points in Illinois to Chicago is small compared with the total volume of the business of the Chicago yards. Likewise, the amount of the meat consumed in Illinois is small compared with the total prepared in Chicago. The constitutionality of the act which placed these transactions under federal regulation was challenged on the ground that it was an attempt to regulate intrastate commerce. If the Supreme Court had followed a narrow application of the principles developed in previous cases, it would have been forced to hold the act unconstitutional. Instead, it chose to look upon all the processes that took place in Chicago as steps in a single interstate journey. In Stafford v. Wallace, the Court in its opinion said that all these transactions were merely incidents in a flow of commerce between the states that shipped the cattle and those that consumed the meat, and that the act was valid. Instead, then, of following a narrow interpretation of what constituted the end of the journey, the Court viewed it from a broad economic point of view. The whole United States is affected by what takes place at the stockyards, and in recognizing this fact the Court accomplished another extension of the commerce clause and an inroad upon state control of local business. Subsequently, in the Schechter case, involving the N.R.A., the Supreme Court found no "flow of commerce" where chickens from other states were slaughtered and consumed in New York,4 but in the Jones and Laughlin case, involving the National Labor Relations Act, the Court applied the principle, in respect to a company which imported a major part of its materials from other states and exported a major part of its products to other states, to the extent of upholding the jurisdiction of a board which was designed to prevent labor disputes and thus to avoid interruptions to the flow (National Labor Relations Board v. Jones & Laughlin Steel Corp.).⁵

Prohibition

Another interesting question in connection with the commerce clause has been whether the power to "regulate" includes the power to "prohibit." Can Congress merely make regulations that affect the flow of commerce, or can it go to the length of preventing that flow altogether? It would appear that the power to prohibit does exist where the article prohibited is inherently bad.

In 1895, Congress prohibited the shipment of lottery tickets in interstate commerce, and the act was upheld in Champion v. Ames.⁶ This decision caused much alarm among those who feared that the power of Congress thus sustained would be used to invade the domain formerly regarded as belonging to the

^{*} See p 624.

⁵ See p 662.

⁶ See p 753

states. Their fears were realized in subsequent events, for this decision, which was handed down in 1903, was followed by a series of acts that excluded from interstate commerce many products that were deemed evil or harmful. Notable among these acts are the Pure Food Act of 1906, involving regulation of the interstate shipment of food and drugs, the Meat Inspection Act of 1907, the Narcotics Acts of 1909, 1914 and 1922, the White Slave Traffic Act of 1910, and, although later held unconstitutional, the Child Labor Act of 1916.

There would seem to be limits, however, to the power of Congress to prohibit, for the Supreme Court has said that while the power to regulate is "plenary," it is not "arbitrary." Thus, Congress would seem to be limited to prohibitions that are reasonable in their nature, but, if reasonable, a prohibition is valid. For example, the shipment of diseased cattle across state lines may be prohibited, for it is not unreasonable to prevent entirely the interstate transportation of articles that are inherently bad. The same applies to impure foods and the like.

Intrastate Commerce

In general, it may be said that a state has control of its internal commerce. The framers of the Constitution did not intend to surrender to the federal government the control of the purely internal commerce of the states. However, this principle is subject to much limitation, for there is a tendency so to interpret the jurisdiction of the federal government over interstate commerce as to reduce the jurisdiction of the state to a minimum. In the first place, the number of miles of purely intrastate railroads is small, and it is over the railroads that most of the commerce that ordinarily is subject to regulation takes place. Even though much of this traffic is transferred to buses, these are likely to be interstate in character and interstate buses are now under federal supervision. As for commerce on water, ships carrying interstate goods have an interstate character, and even though they did not. they would be subject to the control of the federal government under its admiralty and maritime jurisdiction.

An example of the growing tendency to extend the jurisdiction

⁷ See p. 748.

of the central government at the expense of the states is found in a series of cases dealing with rates. The first of these cases upheld state control. The Railroad and Warehouse Commission of the state of Minnesota lowered the rates upon intrastate goods to a point lower than the interstate rate fixed by the federal authorities. The effect was to lower the income of the interstate railroads that carried this traffic. Stockholders of the railroads brought suit, but the Court, in 1913, upheld the state's power over intrastate rates, at least in the absence of an act of Congress to the contrary (Minnesota Rate Cases).

Then, in 1914, came the Shreveport case (Houston Railway v. United States). The Interstate Commerce Commission had approved as reasonable certain rates upon goods between Shreveport in Louisiana and points in Texas lying between Shreveport and Dallas, Texas. The Texas Railway Commission, however, fixed the rates between these Texas points and Dallas at a lower figure than the interstate rates to Shreveport. The distances in each case were approximately the same. The result of this inequality in rates was to make it more profitable for the merchants at the intermediate Texas points to do business with the wholesale houses of Dallas than with those of Shreveport. The lower rates fixed by the Texas Railway Commission effected a discrimination against Shreveport and therefore against interstate commerce, and lowered the return of an interstate railroad. The Interstate Commerce Commission then issued an order to the effect that the railroads should charge no higher rate between Shreveport and the Texas points than they did between Dallas and those points where the distances were equal. The railroads felt that they could not properly be compelled to lower their rates from Shreveport to the Texas points, since these had been declared reasonable by the Interstate Commerce Commission. Of course, they were willing to raise their rates between Dallas and those points, but this would have brought them into conflict with the orders of the Texas commission. Therefore, they refused to comply with the order of the Interstate Commerce Commission for equality in rates. The Supreme Court upheld this order of the Commission, and since the interstate rate had been held reasonable, required that the intrastate rate from Dallas to the intermediate points should be raised. This decision did not lay down the principle that the Interstate Commerce Commission could fix an intrastate rate. It did mean, however, that the Commission could require a relationship between an interstate and an intrastate rate and that, if the interstate rate were reasonable, the intrastate rate must be adjusted. This is not very different from fixing the rate.

The Shreveport Case was followed by the Wisconsin Rate Case (Wisconsin v C.B.&Q.R.R.). The Transportation Act of 1920 had provided for a fair return upon the value of the property of the roads as a whole or of such rate groups or territories as might be established. The Interstate Commerce Commission, under this act, permitted the raising of certain interstate rates. The state of Wisconsin refused to raise its intrastate rates to meet these interstate rates. As interstate railroads were carrying the intrastate goods to which these lower rates applied, the return of the whole road was affected thereby. The Interstate Commerce Commission, therefore, ordered increases in the intrastate rates to meet the interstate rates. The Supreme Court upheld the validity of the order. The circumstances in this case were substantially similar to those in the Minnesota Rate Case, except that in the Wisconsin case the Transportation Act supplied the Congressional authority that was lacking in the other.

The three cases cited above show a steady decrease in the state control of intrastate rates. Such control is approaching the point of disappearance. Congress and the courts have been forced to recognize the fact that the railroads constitute a national unit or at least a number of large units that transcend state lines.

The exercise of the police power upon local commerce is subject to much the same limitations that apply to the exercise of state control over local rates. It cannot be applied in such a way as to effect a burden upon interstate commerce. Thus, a Louisiana statute prohibiting separate accommodations for white and colored persons was not valid even in reference to persons traveling between two points in that state upon interstate steamboats, for if other states had different requirements there might be a constant shifting of passengers as the boat passed from one side of the channel to the other (Hall v. DeCuir).

It is a general rule that when a carrier operating wholly within one state accepts goods for transportation to other states, it is to that extent engaged in interstate commerce. This principle was laid down in regard to water transportation in the case of the "Daniel Ball," a vessel operating entirely in the state of Michigan but carrying goods from and to other states. The vessel was held to be subject to Congressional regulation (The Daniel Ball).

State Regulations and Interstate Commerce

Questions sometimes arise concerning the power of a state to make regulations that affect interstate commerce. While it is true that a state may not strictly "regulate" interstate commerce, nevertheless some state regulations, made under powers admittedly belonging to states, may affect interstate commerce and still be valid. In general, it may be said that such state regulations are valid if reasonable and if passed under the police power or the power to make local regulations, provided they do not conflict with a federal regulation and provided there is no necessity for uniformity over the whole country.

In 1803, the legislature of Pennsylvania passed an act requiring that vessels entering or leaving ports not within the Delaware River should take on a pilot and should make certain reports. In a case involving this act, it was upheld on the ground that it was a proper local regulation, not in conflict with an act of Congress (Cooley v. Board of Wardens). This is the best known of a series of cases upholding such state acts.

In Escanaba Company v. Chicago, a similar question concerning a local regulation was involved. The city of Chicago had erected drawbridges over the Chicago River, connecting different parts of the city, and had provided that between six and seven o'clock in the morning and from half-past five to half-past six in the evening the draws should not be opened, and that during the day between seven o'clock and half-past five they should be opened for not over ten minutes at a time, after which they should remain closed for at least ten minutes. The purpose was to provide passage over the bridges during the morning and evening rush hours and to give reasonable accomodations for such passage at other hours of the day. The Escanaba Company,

with lake vessels engaged in interstate commerce, contested the constitutionality of the ordinance. The Supreme Court held, however, that this ordinance was a reasonable exercise of the state power over local matters.

In like manner the courts have upheld a state law requiring that railroad engineers be examined and licensed, the engineers paying a reasonable fee for the examination (Smith v. Alabama). A state act providing that cars should not contain stoves for heating purposes has been upheld (New York, New Haven and Hartford R.R. v. New York). For the convenience of the public a state may require that trains in reasonable number shall stop to take on passengers at towns of a certain size (Lake Shore & Michigan Southern Ry. Co. v. Ohio). In each of these instances the court held that the act was a reasonable one. Otherwise the state regulation would have been invalid. For instance, in the last case mentioned it would not have been permissible to require that all interstate trains should stop at a small town that already was served by a number of trains.

An act ostensibly passed under the police power but actually discriminating against the goods of interstate commerce is unconstitutional. The state of Virginia provided that beef, veal, or mutton sold in that state should be inspected when the animals had been slaughtered at a distance of one hundred or more miles from the place of sale, a fee of one cent a pound being charged for such inspection. The Supreme Court held this act invalid. As the act made the distance of the place of slaughter the only criterion for determining the need of inspection, and as the tax was of an onerous nature, it was a discrimination against the goods of interstate commerce, placing such goods at a disadvantage as against locally slaughtered meats (Brimmer v. Rebman).

In any case, a state act affecting interstate commerce is unconstitutional if it conflicts with a federal act that deals with the same matter under the commerce clause. Moreover, if the problem dealt with is one that calls for a uniform rule over the whole country, the inaction of Congress is construed as a desire that there should be no regulation at all, and the state law is invalid. In Henderson v. The Mayor of the City of New York, there was involved the validity of an act which required that in addition to

making certain reports concerning passengers, the master or owner of every vessel coming into the port of New York should give a bond in the sum of \$300 for each passenger, to indemnify the state and its subdivisions against expense for the relief or support of such passenger for four years thereafter, except that in lieu of such bond the fixed sum of \$1.50 might be paid outright. The Supreme Court held that the practical effect of this act would be the payment of the fixed sum, that this was a burden upon immigration, and that the subject of immigration as a whole had been confided to Congress and should be treated in a uniform way over the whole country. The act, therefore, was invalid. The effect of this decision was to hold that where national uniformity was necessary, the inaction of Congress would be construed as a desire that the subject should not be regulated by the state.

In the absence of a necessity for uniformity, and where there is no conflict with Congressional legislation, a reasonable state police regulation is valid.

State Taxation of Interstate Commerce

The taxing power of the state may apply even before its regulatory powers may be brought into play. While goods are in interstate transit, they are subject neither to state taxation nor state regulation. In connection with the discussion of the original package docrine, however, it has been observed that after such goods have come to rest, even though still in the original package and unsold, they may be subjected to nondiscriminatory state taxes. In other words, while still exempt from the regulatory action of the state, they are nevertheless subject to its taxing power. If such goods are brought from abroad, however, they are exempt from such taxes, for this would amount to a tax upon imports (Brown v. Maryland.).

The real property of interstate railways has been held subject to the state property taxes, at least in the absence of a federal law to the contrary. This is true even where the federal government has advanced large sums to aid in the construction of the

⁸ See p. 568.

road, has granted land to it, and has made use of its transportation facilities (Thomson v. Pacific Railroad). Incorporation by Congress does not alter this rule (Railroad Company v. Peniston), but franchises conferred by the United States are exempt from state taxation (California v. Central Pacific Railroad Co.).

In taxing the property of an interstate company it is not necessary that the state base the tax upon the sale value of the individual pieces of property. Instead, the property may be evaluated as a part of a going concern. This can best be seen by an example. The Adams Express Company had in Ohio certain real estate, horses, wagons, and other property, which the company valued at \$67,235. After considering the value of the entire capital stock of the company and other evidence, and determining the relative value of the property in Ohio, the state reached a valuation for this property of \$533,095.80. This method of valuation was upheld, for it was not a tax upon the capital stock of the concern or upon interstate commerce, but was merely a tax upon property within the state valued as part of a going concern which used all this property as a part of a single unit (Adams Express Co. v. Ohio State Auditor). The same principle is applied to railroads and telegraph companies. where the tax may be based upon the capital stock of the company and apportioned upon the ratio of miles of line in the state as compared with total mileage. The ratio, however, is subject to the principle that it must be a reasonable one. For instance, allowance might have to be made for expensive parts of a railroad in other states, such as those built through mountains. In the case of rolling stock companies, a proportion of the total capital stock based upon the ratio of miles covered by cars in the state compared with the total miles covered by cars of that company throughout the country may be used as a basis for taxing capital stock within the state (Pullman's Palace Car Co. v. Pa., as modified by Union Tank Line Co. v. Wright).

Admiralty

Closely related to the commerce power is the admiralty jurisdiction of Congress. Most of the powers of the federal govern-

ment are to be found among those granted directly to Congress. One of the few exceptions is in relation to cases in admiralty, which are placed under the jurisdiction of the federal courts. "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction" (Article III, Section 2). From this jurisdiction of the courts, Congress derives its power to legislate upon matters of admiralty.

The admiralty and maritime jurisdiction has been held in the United States to cover subjects not covered by admiralty in England. The rule in England placed the highest point of the admiralty jurisdiction at the upper limit of the ebb and flow of the tides. This was suited to a country like England with small, short rivers, but in America there were great inland seas and rivers navigable for hundreds of miles. As a result, the admiralty jurisdiction has been applied to these inland waters, though this was not made clear until 1851 (The Propeller Genesee Chief v. Fitzhugh). The decisions have not been altogether uniform upon the question of the full extent of the admiralty jurisdiction. In some instances it has been interpreted in such a way as to make the admiralty jurisdiction dependent, in part, upon the commerce clause. The better line of decisions has interpreted admiralty independently. It would appear, therefore, that it applies to any waters that are in fact navigable. It is not necessary that the waters be navigable from the sea. They may even be entirely within one state. It is not necessary that they form part of a line of interstate commerce.

It is evident, therefore, that there are many matters related to water-borne commerce over which Congress has jurisdiction, both under the commerce clause and the admiralty and maritime jurisdiction. The jurisdiction of Congress over water-borne commerce is much broader than that over commerce on land. It covers not only interstate and foreign commerce, but intrastate commerce as well.

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CHAPTER XXX

Transportation

The Granger Laws

The most extensive application of the commerce clause of the Constitution has been in relation to carriers. So long as transportation was mainly by water, very little was done in the way of regulation either by Congress or by the state legislatures. Then came the era of railroad building, accompanied by scandals, such as that involving the Crédit Mobilier, and high rates and discriminations, summed up in the famous phrase attributed to Commodore Vanderbilt, "The public be damned." This led to corrective legislation by the states, known as the Granger Laws, beginning with an Illinois statute of 1871. The power of the states to pass such laws was upheld by the courts (Munn v. Illinois; Chicago, Burlington and Quincy Railway Co. v. Cutts), even to the extent of a decision in 1877 by the Supreme Court which held that in the absence of action by Congress, state regulation of rates upon interstate commerce was valid (Piek v. Chicago and North Western Railway Company). This latter decision, however, was reversed in 1885, when the Supreme Court, in the Wabash case (Wabash, St. Louis and Pacific Railway Company v. Illinois), held that even in the absence of federal legislation, the state laws could not be applied to interstate commerce. The Wabash case left interstate rates and services unregulated, for the states could not act upon them and Congress had not.

The Act of 1887

To take care of the interstate phase of the subject, Congress, in 1887, passed an Act to Regulate Commerce, the first of a long series of regulatory measures that have gradually tightened the

control of the federal government over interstate commerce. In tracing the history of these acts we can see how each is designed to correct weaknesses in those that preceded, until at the present time the railroads complain bitterly that they are unable to realize a reasonable return upon their investment and are completely at the mercy of the public.

The act of 1887 was designed primarily to correct inequalities in rates and other discriminations between shippers. It provided that all charges should be reasonable and just. Rate discriminations between shippers were prohibited, whether they were direct discriminations in which one shipper paid a high rate and another a low one, or indirect devices, such as the "rebate." The latter was the return to a shipper of a part of his shipping charges. Obviously, when granted to one shipper and not to others, this was equivalent to a difference in rates. The act also prohibited unreasonable discriminations between localities or commodities, and provided for equal facilities for interchange of traffic with all connecting lines.

A section of the act known as the Long-and-Short-Haul clause prohibited greater aggregate charges for a shorter than a longer distance "under substantially similar circumstances and conditions" over the same line and in the same direction, where the shorter was contained in the longer distance, with exceptions under the control of the Commission. It seems strange that it should be necessary to prevent a railroad from charging less for a long distance than for a short distance. However, it can be seen that if two companies were operating separate roads between two points, following different routes, competition for traffic probably would bring their charges down to a reasonable rate. or perhaps a "rate war" would take place with consequent loss to the roads. This, however, would apply only to traffic between the two points at which the roads met. Points along either line, served by only one road, would be at the mercy of that road. Consequently, the intervening points paid high rates. The philosophy of the Long-and-Short-Haul clause assumed that competition would bring about reasonable rates between competing points, and that proportionately smaller amounts should be charged for the shorter hauls.

Another section of the act prohibited the "pooling" of freights. Pooling often occurred where two roads were competing for freight at a given point, with resultant low rates. Under one common type of pooling arrangement they might agree to put a percentage of their earnings into a single fund and then divide this fund between themselves according to some predetermined ratio. As a result, neither road would find it advantageous to cut its rates below those of the other. Rates would remain uniform and high, and both companies would profit therefrom.

The act prohibited secret rates and fares. This was to correct a practice under which favored shippers, or rather shippers of sufficient power to compel concessions, would be granted rates below those granted to the general public. The competing small shipper thus found himself at a disadvantage all the more annoying, because he could only suspect the discrimination and could not determine its extent. The act provided for the publication of rates and fares. As will be noted later, the roads found ways of escaping the limitations of this provision, and new legislation was necessary to block these means of escape.

The most important phase of the act of 1887 was the provision for a quasi-judicial commission, the Interstate Commerce Commission. It is true that in this first act the Commission was not given the broad powers that subsequently have been granted to it. Nevertheless, the creation of the Interstate Commerce Commission was in itself of great significance. It was a recognition of the fact that Congress believed that it could not depend upon the courts to enforce regulations that were really administrative in nature. For instance, let us assume that no commission had been set up and that the law had merely said that all charges should be just and reasonable. Then an individual who believed that he had been charged rates that were not just and reasonable would have had to bring his case before the courts. But when is a rate just and reasonable? No more difficult economic problem could be presented. It involves intricate questions in railroad administration. Yet it would need to be passed upon by a judge who probably had no special training in railroad administration. The burden of proof would always be with the individual to show that he had been charged an unreasonable rate. Even though the measure for "reasonable" were taken to be "nondiscriminatory," it would be difficult without access to the records of the company to prove that there had been discrimination. In any case the process would be expensive and the advantage would always be with the railroad. Moreover, when one rate had been declared unreasonable, a slight adjustment in the rate would have presented a new question and a new case. Under these circumstances, there was needed an impartial administrative tribunal to examine and pass upon the facts, leaving to the courts only the questions of law and a general review of the case with every presumption in favor of the facts as determined by the administrative tribunal. Accordingly, Congress set up the Interstate Commerce Commission.

Even this solution did not make it certain that the courts would not attempt a review of the facts in cases coming up from the commission. As we shall see,1 it was many years before the courts came to the point of accepting the Commission's findings of fact as conclusive. Just what constitutes the "facts" and what constitutes "law" in rate making is in itself a difficult question. Looked at in one way, the determination of whether a rate is reasonable or unreasonable is a question of "fact." From another point of view, the determination of whether a given rate comes within the term "unreasonable" is a question of law. The courts, interpreters of law, were slow in surrendering to an administrative tribunal a function that is in essence judicial. In time, they came to the point of laying down principles for determining the extent of the jurisdiction of the Commission within which its findings would be conclusive. Roughly, the dividing line is between those problems that require the knowledge of an expert in the economic phases of railroad administration, and those problems that call for the knowledge of one trained in the law.

A Commission was necessary for other purposes than the determination of questions concerning rates and discriminations. As an investigative body to aid Congress in further legislation, the Interstate Commerce Commission has been of great value in

¹ See p 587

reporting facts and making recommendations. In time, other broad functions were given to the Commission.

The act of 1887 provided that the Interstate Commerce Commission should consist of five members, to be appointed by the President with the advice and consent of the Senate, serving for a term of six years, except for the first members, whose terms were staggered. The Commission was given authority to investigate alleged violations of the law, with power to order the submission of information and attendance of witnesses. The Commission was empowered to serve notice upon carriers who violated the act to cease and desist and to make reparation for injuries. Where carriers refused to observe an order of the Commission, that body was given authority to petition the federal courts for writs to compel obedience. The carriers were to send detailed annual reports to the Commission upon finance, equipment, revenues, and expenses. The Commission was to report annually through the Secretary of the Interior to Congress and to make recommendations in regard to needed legislation.

Difficulties in the Courts

The early years of the Commission were not encouraging. Adverse court decisions weakened its usefulness. In Counselman v. Hitchcock, the first blow fell. The act of 1887 had given the Commission power to compel witnesses to testify before it. The Constitution, however, protects witnesses from self incrimination. To guard against the claim of a witness that his testimony would incriminate him, and thus secure an exemption from appearing, the act had provided that "such evidence or testimony shall not be used against such person on the trial of any criminal proceeding." In Counselman v. Hitchcock, the Supreme Court held that while this would protect the witness from the use against him of testimony given before the Commission, it would not protect him from the use of other evidence that was found through his testimony. A witness might testify as to certain criminal proceedings in which he had been engaged and this testimony could not be used against him, but with this evidence to guide them the authorities might search out other evidence that could be so used. This clause, therefore, did not give full protection to witnesses from self incrimination and hence was invalid. Without the power to compel the attendance of witnesses the Commission was ineffective, for if it could not secure evidence, it could not prosecute cases, and the Supreme Court decision left it helpless to secure evidence in many instances. In 1893, a new act granted immunity from "any penalty or forfeiture for or on account of any transaction, matter, or thing" concerning which the witness might testify. In the case of Brown v. Walker, this was held to be sufficient protection to the witness.

The Commission was hampered by the necessity of resorting to the courts for enforcement of its orders, with the consequent delays. The courts refused to accept as final the decisions of the Commission upon the facts in cases before it, with the result that contestants did not attempt to furnish the Commission full information. The courts, with fuller information, might reverse the decision of the Commission, with a resulting loss to it in prestige. In the Social Circle Case (Cincinnati, New Orleans and Texas Pacific Railway Company v. Interstate Commerce Commission), the Supreme Court expressed its disapproval of this practice of withholding essential information from the Commission until the case had reached the courts. However, the practice continued for several years until the Court had clearly defined the rights of the Commission in this respect.

In the Maximum Rate Case (Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.), it was held that the Commission could not prescribe future rates, but must wait until the charge had been made and then pass upon its reasonableness. The position of the Supreme Court was that the prescribing of future rates was a legislative function, and that Congress must transfer the power in clear terms before the courts would recognize the jurisdiction of the Commission. On the other hand, the power to pass upon the reasonableness of a rate already fixed was permissible, as this was merely the application of principles recognized in the common law. This was a most serious blow to the Commission. Before it could act in any particular case, the damage would be done. After the shipper had paid his charges and passed them on to the consumer,

there would be no benefit to the public in securing a refund for the shipper. Moreover, after a rate had been declared too high, the road could slightly lower its rate and thus present a new question of reasonableness for the determination of the Commission. This process could be continued almost indefinitely. The effect of the Maximum Rate decision was to render the Commission practically helpless in the matter of rates.

The Long-and-Short-Haul clause of the act of 1887 had been worded ambiguously. The phrase "under substantially similar circumstances and conditions" left the way open for differences in interpretation. Various court decisions, more especially the Alabama Midland Case (Interstate Commerce Commission v. Alabama Midland Railway Co.), in 1897, nullified the effect of the Long-and-Short-Haul clause.

The effect of these decisions practically was to divest the Commission of power. Reduced to little more than a fact-finding and recommending body, it remained such for several years.

The loss of effective regulatory power by the Commission turned out not to be entirely advantageous to the railroads, for they became the victims of a system under which they were compelled to offer special favors to powerful interests.

While the act of 1887 had prohibited discriminations between shippers in rates and had also prohibited the "rebate," a multitude of expedients for giving what were, in effect, rebates had since come into being. For instance, to favored shippers using their own equipment, such as tank cars, an excessive amount would be paid for the use of such cars by the railways. To the owners of spur lines an excessive part of the total rate would be assigned. In other cases, materials would be bought from the shipper at a high rate, excessive damage claims would be accredited, "demurrage" charges would not be made, or "midnight tariffs" applying for a brief period would be announced in advance to those shippers who were to be favored. The "midnight tar-1ff," of course, was not a means of returning money already paid, but was actually a discrimination in rates, although anyone could take advantage of these transitory rates—provided he knew that they existed. Another form of discrimination was the furnishing of cars to certain shippers during car shortages, while other shippers were forced to wait. The total amount of these open and concealed rebates is not known, but for the whole country it must have been an enormous sum. An investigation in Wisconsin of one road disclosed direct rebates, despite the prohibitions of the act of 1887, of around \$7,000,000 during a period of about six years.

The Elkins Act

The first step toward rehabilitation was taken with the acquiescence if not the active support of the railroads. The Elkins Act was passed through Congress in 1903 without difficulty. This act provided penalties for both carrier and shipper for variations from the published rates, or for other discriminations. Under the act of 1887 only the railroads had been subjected to penalties for variations from the law. However, it was not the railroads but the powerful shippers that were the active influences in the infractions. It was these shippers who profited from the discriminations. The railroads were unwilling accessories and losers in the process, being drawn into these conspiracies through their competition for the freights of the big shippers. The new legislation, in providing penalties for both railroad and shipper, was a protection for the roads and was desired by them as a deterrent to the solicitations of the shippers. The country was confronted by the spectacle, unusual at that time, of an industry itself demanding government regulation.

The second innovation in the Elkins Act lay in the fact that it made illegal any variations from the published rates. Previously it had been necessary to prove that there had been discrimination in order to establish illegality in such cases. Frequently it was difficult to establish the fact of discrimination. The Elkins Act made illegal any departure from the published rates. It would not be necessary to prove discrimination. The "midnight tariff," of course, was eliminated.

The Hepburn Act

Disclosures of continued railroad abuses and the resulting public indignation led to the further strengthening of the Commission in the Hepburn Act of 1906. While this act dealt with many

matters, its most important provision gave to the Commission the power to prescribe just and reasonable maximum rates, regulations, and practices. Except with permission of the Commission, new rates or regulations were to become effective only after thirty days and the Commission was authorized to fix reasonable maximum rates which might be made effective for a period of two years. This restored the power lost in the Maximum Rate Case. From now on the Commission could prescribe definite future rates. There was one limitation upon this power, however. Circuit Courts with three judges presiding had the power to suspend or set aside orders embodying future rates upon five days notice, but there were means for expediting such cases.

The opposition to the passage of the Hepburn Act centered around the contention that the authority to prescribe future rates was a delegation of legislative power to the Commission. It was argued that the prescribing of rates was a legislative function, granted by the Constitution to Congress, and that Congress could not transfer this power to another body. On the other hand, it was obvious that it was impossible for Congress, as a practical matter, to work out proper rates for the many commodities transported by the railroads under the varying conditions of traffic. Only a body of men who were expertly informed upon traffic matters could meet such problems intelligently. To become so informed, they must devote their entire time to the business in hand. Moreover, they must be judicially minded and free from the influences of politics. Only an administrative tribunal such as the Interstate Commerce Commission could meet these conditions. The country wanted effective regulation and the opposition was not sufficient to overcome the public feeling that sent the bill through both houses of Congress with only a few dissenting votes.

Even after the Hepburn act containing this provision for rate fixing had gone into effect, it was by no means certain that the courts would not deny to the Commission all effective control by taking to themselves the power to review not only questions of constitutionality and questions concerning the jurisdiction of the Commission but also questions of fact. If that were done, the Commission would remain, as under the Act of 1887, a body be-

fore whom a mere preliminary hearing was granted. In Interstate Commerce Commission v. Illinois Central Railroad Co., however, the Supreme Court upheld, in general, the conclusiveness of the Commission's findings as to the facts. This position of the Court has been adhered to in subsequent decisions. As previously pointed out,2 the line of demarcation is between those matters, technical in nature, that require the knowledge of an expert in railroad problems and those matters that do not call for expert knowledge but do require the determination of an authority trained in the principles of law. Specifically, the grounds upon which the courts will review a decision of the Commission are summed up in Interstate Commerce Commission v. Union Pacific Railroad Co. as follows: "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

While its provision for rate fixing constituted the most important feature of the Hepburn Act, it dealt with other matters of considerable importance. Perhaps the most interesting of these was the so-called Commodities Clause, which made it unlawful for a railroad to transport any commodity manufactured, mined, or produced by it, except timber and its products, and products intended for its own use. This clause was intended principally to prevent railroads from holding coal mines which would thus

^{*}See p 582.

have a favored position over other mines. In addition to the natural advantages arising from a common control, it was possible for the railroad to discriminate against competing mines through exorbitant rates and all the other devices known to the practices of the times, provided, at least, the Commission did not interfere. On the other hand, the clause would seem unfair to those roads that drew a large part of their profits from their coal mines.

The Hepburn Act extended the jurisdiction of the Commission to cover pipe lines for oil, express companies, sleeping-car companies, various terminal services, switches and spur lines. Passes were prohibited except for certain classes of persons. This was a blow to politicians who had been able to secure free transportation not only for themselves but for constituents. Congressmen who had profited from the practice of issuing passes in this liberal way could not have felt that the railroads were entirely bad, and a sympathetic attitude on the part of statesmen certainly was desired by the roads. Now this happy arrangement was brought to a close. Another provision strengthened the position of the Commission by requiring publicity and standardization of the accounts of railroads, a measure of benefit to the Commission, the public, the shippers, and the carriers. In recognition of the additional duties placed upon it, the Commission was increased by the addition of two members, thus bringing the membership up to seven.

The Mann-Elkins Law

Four years later, in 1910, the Mann-Elkins Law was passed. The most interesting of its provisions was the establishment of a Commerce Court, of five judges, to take appeals from the Commission. The life of this court was stormy and brief. Unfortunately, the Commerce Court insisted upon that broad review of facts as well as law that had been repudiated by the Supreme Court. Had it followed a different policy, it might have served a useful function in facilitating the progress of cases through the courts. For some time it reversed most of the decisions of the Commission that were appealed to it, and then was in turn re-

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versed by the Supreme Court. Finally, in 1913, its troubled and unhappy existence was brought to a close, and thus was ended an interesting attempt of the United States to establish what bore much resemblance to the administrative courts so successful on the continent of Europe.

The Mann-Elkins Law also transferred to the Department of Justice the prosecution of appeals from the Commission, though the Commission or other interested parties might appear and be represented by counsel. Another provision gave to the Commission power to suspend a change in rates announced by the railroads, in order to examine into their reasonableness, thus further strengthening its power over rates. Telegraph, telephone, and cable companies were placed under the regulatory power of the Commission.

Another provision revived the Long-and-Short-Haul clause, ineffective since the Alabama Midland case in 1897, by striking out the ambiguous and troublesome phrase "under substantially similar circumstances and conditions," and by making some other changes.

One of the most difficult problems for the railroads in the maintenance of rates has been the competition of water transportation. This has been especially true at terminals on the Atlantic and Pacific oceans, since with the building of the Panama Canal there was the problem of meeting the competing rates of water carriers using the Canal between Atlantic and Pacific ports. Moreover, with the operation of the Long-and-Short-Haul clause, intermediate points profited by the low rates at the terminals. The old practice of charging for points intermediate between two terminals the rate for the whole distance between the two terminals plus the rate from the final terminal back to the intermediate point, could not be resorted to. It was only logical that the railroads should attempt to gain control of the competing water carriers. In 1912, however, the Panama Canal Act made it unlawful for a railroad to have an interest in competing water carriers operating through the Panama Canal or elsewhere, unless it was approved by the Commission as in the public interest, and also further extended the authority of the Commission over rail-and-water routes.

The Valuation Act

The next year, in 1913, the Valuation Act placed upon the Commission the duty of determining the value of the property of the various railroads of the country. If railroad rates are to be controlled by a government agency and are to be so adjusted as to give a "reasonable" return to the roads, it is essential to know what is the amount of the investment upon which a reasonable return is to be permitted. The task, however, is enormous. It constitutes the greatest evaluation project ever attempted.

Changes in the Commission

In 1917, the Interstate Commerce Commission was enlarged from seven members to nine, and it was authorized to assign portions of its work to divisions of not less than three each, the divisions having power to act for the Commission, subject to a possible rehearing before the full body. This was a very considerable relief to the Commission, reducing the number of minor cases coming before each member by two thirds. At the same time, doubtful or important cases might secure through a rehearing the benefit of consideration before the Commission as a whole.

Government Operation

The World War brought about a complete suspension of the activities of the Commission as an arbiter between the roads and the public. On January 1, 1918, the railroads, sleeping-car companies, and express companies, and later the telegraph, telephone, and cable companies, were taken over by the United States government for operation under acts passed under the war power. During the war period the Commission was authorized to fix standard-time zones for the country. It did this by dividing the country into four zones, adjusting the boundaries somewhat to care for local needs.

The Transportation Act

When, after the close of the war, the federal government returned the roads to private control, the Transportation (Esch-

Cummins) Act of 1920, by which this was accomplished, further extended the jurisdiction of the Commission in many ways. It was empowered to fix minimum as well as maximum rates, thus permitting it to take action to prevent "rate wars" and rate cutting for competitive purposes. The principle in the Shreveport cases³ was utilized in giving specific authority to the commission to revise state rates and practices where there was undue discrimination against interstate commerce. Congress was taking advantage of the weapon furnished in the Shreveport cases to exercise a control over intrastate rates.

A policy in rate fixing was laid down in this act. The Commission was to fix rates that would yield a fair return upon the value of the property of the roads as a whole or of the property of such rate groups or territories as might be established, and where "strong" roads earned over six per cent, one half of the surplus must be put in a reserve fund by the carrier and one half might be "recaptured" by the Commission and put into a revolving fund to enable the roads to make certain improvements. After the reserve fund had reached five per cent of the value of the property of the company, any excess might be used by the company for any lawful purpose. These provisions were repealed in 1933.

The Transportation Act further provided that in the future securities issued by the roads must have the approval of the Commission. The purpose was to protect the shareholders and the public against issues of "watered stock" and to simplify the problem of evaluation. (Railroad securities still remain subject to the jurisdiction of the Interstate Commerce Commission, having been exempted from the provisions of the Securities Act of 1933.) 4 Further restrictions upon the independence of the roads forbade the construction of new lines or of extensions and forbade the abandonment of old ones without the approval of the Commission. The Commission was given certain positive powers. It was authorized to order a road to provide new equipment or even to construct new lines. It was empowered in emergencies to take over the control of car service. This latter power

³ See p 571 ⁴ See p 630.

may be of great importance at times when there is a shortage of cars in one area and a surplus in another. Its advantages are apparent, but it represents, together with the other provisions of the act, the most complete socialization of the operation of the roads yet known in peacetime. Only during the war, with government operation in force, had the country experienced so complete a domination by the public of the transportation system.

Another feature of the Transportation Act took the form of a departure from the old policy of the maintenance of competition. The closing years of the nineteenth century had witnessed a war upon the "trusts," upon combinations of capital, and upon "big business." The hope of the public, it was believed, lay in the maintenance of competition in business. Dependence, therefore, was placed in legislation to prevent the union of existing competing companies, upon the assumption that the public would benefit from the lower prices that would result from their competition. Unfortunately, the competitive system involves elements of waste. Two roads operating in the same territory may save themselves much loss through duplication by cooperating or combining. The public may benefit from the lowered expenses of the roads. The Transportation Act marked a complete departure from the old "trust busting" doctrines. Whereas the older policy had been aimed to prevent "pooling" arrangements and consolidations of roads that would result in hampering competition, the new act authorized pools under certain circumstances and even offered encouragement to combination. Pools were authorized where they met the approval of the Commission. Instead of the disastrous cutting of rates at competing points, the roads may now determine upon reasonable tariffs and divide the returns according to some prearranged plan. The public is protected against the possibility of high rates through control by the Commission. The act also authorized the acquisition of control by one carrier over another when this does not amount to consolidation, provided again that the arrangements are approved by the Commission.

The most extreme departure of the Transportation Act from the doctrine of the maintenance of competition lay in its provision for the consolidation of the carriers of the country into a small number of systems. Unfortunately, the specifications of details were such as to make the plan almost impossible of fulfillment. Independent of the terms of this act, plans for consolidation have been considered, and it is not impossible that in time a plan can be agreed upon that will be satisfactory to the roads and will also meet with the approval of Congress.

Interlocking directorates between carriers without authority of the Commission were prohibited by the Transportation Act. This means that a unity of action between roads cannot be brought about by the device of including directors from one road among the directors of another. The act also contained provisions to care for the financial difficulties incident to the transfer back from public to private control.

The Commission was increased from nine members to eleven, to be appointed by the President with the advice and consent of the Senate for a term of seven years, with the restriction that not over six be of one political party. The terms of office are so arranged that the Commission is renewed gradually.

Motor Carriers

In 1935, the Motor Carrier Act brought interstate buses and trucks within the jurisdiction of the Commission. Automobile transportation had been cutting into the business of the railroads, and equity to the railroads required that motor carriers should be brought under some central control. The Motor Carrier Act covers four classes of subjects—common carriers, contract carriers, private carriers, and brokers. Powers of the Commission over the three classes of carriers varies between each class, but in general covers safety requirements, maximum hours of labor for employees, reasonable service, reasonable rates, and requirements of records and uniform accounts. In respect to brokers who make contracts in motor transportation, the Commission has jurisdiction to issue regulations affecting financial responsibility, accounts, and business practices.

The administration of this act involves new problems for the Commission, for the motor carrier business is distributed among a multitude of private owners and small corporations lacking the

permanence and stability of the railroads. Many of the owners are poorly educated. The Commission is confronted with the large task of bringing these private owners to a comprehension of the problems involved in regulation, and of securing acquiescence in regulation by the Commission.

Other Acts

Certain other legislation, not included in the important acts referred to above, include safety appliance laws, laws concerning the inspection of boilers, an accidents reports act, and an act which requires the unloading and feeding of live stock each twenty-eight hours, except that the shipper may permit extension to thirty-six. The Sherman Act and the Clayton Act, later to be discussed,⁵ also affected railways.

The Hours of Labor

Labor legislation included the Hours of Service Act, limiting the labor of employees on the roads to sixteen hours of continuous service out of twenty-four, train dispatchers being limited to even shorter periods.

Federal intervention of an unusual nature was involved in the Adamson Act of 1916, which, in the face of an impending railroad strike, provided for an eight-hour day. Wages for the eight-hour day were not to be reduced below the wages for the old ten-hour day, with proportionate extra pay for overtime. The wage provisions of the act were temporary and were to be effective for a period not exceeding a total of eleven months. Meantime, a commission was set up to study the problem. The constitutionality of this act was upheld by the Supreme Court in Wilson v. New as justifiable in an emergency to prevent a tie-up of the transportation facilities of the country.

Employers' Liability

Employees of the railroads are protected against accidents by the federal Employers' Liability Act of 1908. An earlier act of 1906 had made the interstate railroads liable for accidents to all

⁵ See pp. 606, 609.

their employees when due to negligence of the carrier. This act was held unconstitutional by the Supreme Court in the First Employers' Liability Cases, since its provisions had applied to all employees of interstate railroads, even though the employee might be engaged in intrastate commerce at the time of the injury. The act of 1908 applies only to employees of interstate railroads while engaged in interstate commerce. This act is within the regulatory power of Congress (Second Employers' Liability Cases).

The Retirement of Employees

In 1934, Congress passed a railroad retirement law. Employees attaining the age of sixty-five or having served for thirty years were to be paid an annuity based upon compensation and years of service. Employees were to contribute to the retirement fund in proportion to compensation and the railroads were to contribute double the employee contributions. Administration was placed in a Railroad Retirement Board.

This act was held unconstitutional by the Supreme Court in Railroad Retirement Board v. Alton Railroad Co. on the grounds that it violated due process of law and was not justified under the commerce clause. The act had included as eligible to retirement persons who had been in carrier service within a year prior to the enactment of the law whether later reemployed by the roads or not, and without reference to the reasons why they had been released from service. Persons discharged more than a year prior to enactment of the law but later re-employed, even for a brief period, would be eligible for retirement upon the basis of their total service with the railroads. Persons attaining the age of sixty-five who had served for only a brief time, and even though discharged for peculation or gross negligence, would receive a pension. Many now in service would be retired without having contributed to the fund. Persons with thirty years of service would receive a pension without regard to competence and at their own option. Representatives of employee organizations who had "performed service for a carrier" were eligible after making certain payments. The contributions of all the carriers were pooled in a common fund, thus forcing some carriers to bear a heavier burden than they would with an independent plan. For these reasons the Court concluded that the act violated the due process provisions. The Court also said that the act was not justified under the commerce clause, since caring for the social welfare of employees had no direct relationship to efficiency in the operation of the railroads. Four of the members of the Court joined in a dissenting opinion which admitted that certain phases of the act, such as the inclusion of former employees, were unconstitutional, but objected particularly to that part of the reasoning of the majority which would have barred any compulsory railroad retirement plan as beyond the commerce power of Congress.

Following this decision Congress passed the Railroad Retirement Act of 1935, which was intended as a temporary measure. The annuities under this act were payable out of the federal Treasury, thus presumably avoiding the Constitutional objections raised to the earlier act. However, in fact, in a separate act a tax was levied upon each employee, amounting to three and onehalf per cent of all compensation not exceeding three hundred dollars a month. An equal amount was to be paid by the employer upon the salary of each employee. The funds were to go into the Treasury without being earmarked for railway refirement purposes. This act has been superseded by the Railroad Retirement Act of 1937. The present act does not apply its provisions to former employees who should not after enactment of the new law be re-employed by the roads. Its retirement and annuity provisions apply to employees who are retired at the age of sixty-five or over, to persons who are retired for disability at the age of sixty, and to persons who are retired at the age of sixty with thirty years of service. Annuities are computed upon the basis of term of service and compensation. If elected by the employee, there is provision for payment of annuities to the wives of employees who survive them, the monthly amount being reduced upon an actuarial basis. The act is administered by a Railroad Retirement Board. In a separate act the taxes levied in the separate act of 1935 were continued. The chief difference between the act of 1937 and that of 1934 is that the annuities are payable out of the Treasury, although in fact it is intended that they will be met by the special taxes levied in the separate act.

Unemployment Insurance

In June, 1938, a system of unemployment insurance for railroad employees was set up. Payments to an employee range from \$1.75 to \$3 00 a day of unemployment, depending on his compensation during the preceding year. However, payments may not exceed eighty days in a year or approximately sixteen days a month, and payments do not begin until after the employee has been unemployed for fifteen consecutive days or eight days out of two halfmonths. The employers are required to contribute to an unemployment fund for these purposes, to the extent of three per cent of the compensation, not exceeding \$300 a month, of each employee.

Labor Disputes

The peaceful settlement of disputes between the railroad and their employees is regarded as of special interest to the public, since strikes that would tie up the nation's transportation system would cause immediate and widespread suffering. A number of different plans for dealing with the employee relations of the railroads have been tried. An early act of 1888 was followed by the Erdman Act of 1898, providing for mediation and voluntary arbitration of disputes between the companies and their road employees, and the Newlands Act of 1913, providing for boards of arbitration and a permanent Board of Mediation and Conciliation. These acts were later superceded by the labor provisions of the Transportation Act of 1920, and these provisions were replaced by the Railway Labor Act of 1926. This act has now been replaced by the Railway Labor Act of 1934.

The present plan involves the use of two boards, the National Mediation Board and the National Railroad Adjustment Board. The National Mediation Board has jurisdiction under that part of the law which requires both the railroads and the employees to exert every reasonable effort to maintain agreements concerning rates of pay, rules, and working conditions. This Board does not have authority to settle disputes, but does have jurisdiction to see that the parties to a dispute meet the conditions of the act

in respect to attempting to reach a settlement. The National Railroad Adjustment Board is a judicial body with authority actually to settle disputes over rates of pay, rules, and working conditions in so far as the disputes arise out of agreements already made. Thus, the National Mediation Board attempts to bring the parties together so that agreements will be made, although it may not actually compel them to make agreements or determine the terms. After an agreement has been made, however, the National Railroad Adjustment Board has jurisdiction to hear and actually settle disputes arising from differences upon the interpretation of the agreement.

Organization of the Interstate Commerce Commission

Except in relation to the retirement of employees and the settlement of labor disputes, the Interstate Commerce Commission is the chief regulatory and administrative body in respect to transportation by land. It has become one of the most important tribunals in the country. Often its decisions involve tremendous sums of money. Some have involved as much as a million dollars a day. Its eleven members serve in yearly rotation as chairman. The Secretary, appointed by the Commission, is a permanent officer. The Commission now does much of its work in divisions rather than *en banc*. Each division, of which there are now five, deals with a different class of problems. For instance, division number five deals with motor carriers. In addition to these divisions, there are committees to deal with administrative problems.

Complaints to the Commission may be either informal or formal, and are referred to the Bureau of Informal Cases or the Bureau of Formal Cases. The endeavor of the Bureau of Informal Cases is to settle cases without the more lengthy procedure necessary in formal cases, but consideration by this Bureau does not prevent the complainant from filing a formal complaint. Formal cases go to the Bureau of Formal Cases and are handled in one of three ways: (1) oral hearings are usually held at a place convenient to the complainant; (2) shortened procedure cases are based upon written statements of facts and written arguments; (3) modified procedure cases provide for written state-

ments, supplemented by oral hearings upon points of disagreement. In only a few cases, however, has the modified procedure plan been followed. After the arguments have been presented, an examiner reports upon the case with his recommendations. This report is served upon the parties and if not accepted, there is an oral hearing before a division or the whole Commission. Very important cases are assigned to a member of the Commission for report. Some inquiries are instituted by the Commission itself without a complaint having been filed.

Water Transportation

In the early history of the United States its foreign shipping ranked second only to that of Great Britain, and the American flag was seen in all the ports of the world. Our eminence in this respect was due in part to abundant resources in materials for the construction of wooden vessels. The decline in American shipping was due primarily to the change from wooden to metal ships. The decline was accelerated during the Civil War when the Southern commerce destroyers sank many vessels and drove others to foreign registry.

Before the World War, the only federal aid granted to American shipping lay in contracts for carrying the mails, which were granted to American-built vessels, with American officers, and having a certain percentage of American citizens in the crew.

During the World War, it became necessary to construct rapidly an American merchant marine for the carrying of supplies to our allies. The Shipping Act of 1916 set up a United States Shipping Board to have charge of this development, and the Shipping Board created the United States Shipping Board Emergency Fleet Corporation as its agency in the purchase, construction, and operation of vessels.

Following the World War, the Merchant Marine Act of 1920 and that of 1928 attempted to adapt to peacetimes the policy of encouraging American shipping, continuing the Shipping Board and the Emergency Fleet Corporation.

Eventually, the Merchant Marine Act of 1936 abolished these two agencies and set up the United States Maritime Commission

of five members appointed for overlapping six-year terms by the President with the advice and consent of the Senate.

The most important function of the Commission consists in the administration of a construction-differential subsidy and an operating-differential subsidy. The construction-differential subsidy is paid by the Commission as an encouragement to the development of shipping and is equal to the difference between the lower cost which would have been involved had a ship been constructed abroad and the higher cost of construction here. The operatingdifferential subsidy is given to operators of vessels and is the difference between the cost of operating a similar foreign vessel and the actual cost of operating the American vessel. A third function of the Commission comes into effect if the subsidy plan does not prove sufficient to bring about the needed development to shipping. In such case the Commission may construct the vessels out of its own funds and let them out to American operators. In 1938, the Commission was authorized, under certain conditions, to purchase vessels already constructed in the United States.

The Commission possesses regulatory powers which it exercises as a condition to its grants of aid. These powers primarily relate to services, finance, safety, and working conditions of employees on the vessels. In 1938, there was established a Maritime Labor Board of three members, with mediatory powers in maritime labor disputes and in the making of maritime labor agreements.

A number of other agencies offer aid to American shipping. The Bureau of Lighthouses of the Department of Commerce maintains lighthouses, light ships, buoys, spars, radio beacons, and similar aids to navigation. The Coast Guard of the Treasury Department maintains life-saving stations, coastal vessels and airplanes, radio stations, coastal telephone, telegraph and cable systems, and an ice patrol. Storm warnings to vessels are issued through this agency. The Weather Bureau of the Department of Agriculture supplies weather data and issues storm warnings. The Naval Observatory supplies astronomical data and tests navigation instruments. The Coast and Geodetic Survey of the Department of Commerce supplies maps and charts of coastal

waters. The Hydrographic Office of the Bureau of Navigation of the Navy Department supplies charts of foreign waters and furnishes sailing directions to vessels. The Public Health Service of the Treasury Department maintains marine hospitals, in addition to carrying out such regulatory functions as the establishment of quarantines at ports. The Corps of Engineers of the Army dredges channels and constructs canals and other aids of an engineering nature. The Inland Waterways Corporation in the War Department aids domestic water-borne commerce by maintaining a barge line on the Mississippi and its tributaries.

Water carriers, under acts of 1916 and 1920, may not engage in unfair practices, create monopolies, or enter into contracts in restraint of trade. Intercoastal carriers must, under an act of 1933, file schedules of their fares and transportation charges. These regulations are enforced by the Maritime Commission, established in 1936. The Bureau of Marine Inspection and Navigation issues regulations in connection with the operation of vessels, inspects them for safety equipment, approves plans for passenger vessels, examines officers for licensing, investigates marine casualties, and in general is charged with the administration of the laws relating to the safety of vessels. The Bureau of Customs and the Coast Guard assist in the enforcement of regulations of the Bureau of Marine Inspection and Navigation.

The Interstate Commerce Commission has no general jurisdiction over vessels engaged in foreign commerce, although American vessels must file sailing schedules with it. The Commission's regulatory powers in respect to foreign commerce are of a minor character.

Air Transportation

Previous to 1938, transportation by airplane was in most part under the jurisdiction of the Secretary of Commerce, although some powers in relation to air mail contracts were exercised by the Interstate Commerce Commission. The regulatory powers of the Secretary of Commerce related primarily to the examination of planes from the point of view of safety, the testing of aviators, the establishment of rules of air navigation, the registration of planes, and the investigation of accidents in air travel.

In 1938, the powers of the Secretary of Commerce were transferred to a new agency, the Civil Aeronautics Authority, consisting of five members, appointed by the President with the advice and consent of the Senate for staggered terms of six years. The act strengthened the powers of the Authority in relation to safety and gave it regulatory powers over commercial aviation resembling those exercised by the Interstate Commerce Commission over railroads. The act required the air companies to publish their rates and to adhere to them, prohibiting rebates and evasions. Discriminations between localities, unfair and deceptive practices, and unfair methods of competition were forbidden. Consolidations, mergers, and pooling agreements were subjected to control. The Authority was made the agency for the enforcement of these regulations. Under this act, while the Postmaster General has a large degree of control over rates paid to foreign carriers and fixes air mail schedules, the Authority determines the rates to be paid to American carriers.

Under the Authority is an Administrator, chosen by the President with the advice and consent of the Senate for an indefinite term, who is the executive officer of the Authority. There is also within the Authority an Air Safety Board of three members, appointed by the President with the advice and consent of the Senate, which is concerned with the investigation of accidents and the making of recommendations for their prevention.

Communications

The telegraph and the telephone are instruments of interstate commerce when they cross state lines, and the radio necessarily is such, since the radio waves are not confined to the state in which they originate.

In 1910, the Mann-Elkins law placed telegraph and telephone companies under the Interstate Commerce Commission. The Radio Act of 1927 established a Radio Commission and gave it power to classify broadcasting stations, assign wave lengths and station power, control the use of apparatus, and exercise some other powers in relation to the broadcasting stations. Originally it was intended that these powers should in one year be trans-

ferred to the Secretary of Commerce, but the Radio Commission continued until 1934, when the Communications Commission was set up.

To the Communications Commission were transferred from the Interstate Commerce Commission control over telephone and telegraph lines, and from the Radio Commission control over radio.

Under the act of 1934, radio licensees are specifically subjected to the anti-trust laws. Violations are under the jurisdiction of the Federal Trade Commission. Upon conviction, licensees are subject to the penalties of the anti-trust laws and in addition may have their licenses revoked by the court.

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CHAPTER XXXI

The Regulation of Business

The Sherman Anti-Trust Act

When Congress, in the Sherman Act of 1890, prohibited certain practices among corporations and other business enterprises engaged in interstate commerce, it was not introducing an innovation into our law. The right of the public to regulate business practices had long been recognized. The statute against forestallers, regrators, and ingrossers, in 1552, is an example of early English regulation. It had for its purpose the correction of certain abuses strikingly similar to those against which the Sherman Act and succeeding American acts were directed.

The Sherman Act read: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Violation was made a misdemeanor, with a punishment of a maximum fine of five thousand dollars, or imprisonment of not over a year, or both. Another clause applied the restriction to the commerce of the territories and the District of Columbia, including their purely internal commerce. Punishment was provided for persons who should monopolize or attempt to monopolize or conspire with others to monopolize any part of the commerce between the states or with foreign countries.

The prohibitions of the Sherman Act applied to a single type of abuse. It forbade only contracts and combinations in restraint of trade. It did not forbid any company from expanding and becoming as large as it could, provided it did not do so by combining with other companies so as to restrain trade. It did not forbid improper practices generally, provided contracts were not made in restraint of trade. The idea back of the Sherman

Act was that if competition in business could be maintained, the public would be sufficiently protected. It opened the era of "trust busting." The public had witnessed the creation of great corporations through the combination of companies that had been in competition, and the resultant driving out of small competitors. Where a company could drive out a competitor, it had done so. Where it could not drive out a competitor, it might effect a combination. When a single corporation secured a virtual monopoly of a business, the public often suffered through high prices. It was to protect the small competitor from being driven out by these combinations, and to protect the public from the high prices that could be demanded by monopolies, that the Sherman law was enacted.

Interpretation of the Sherman Act

The supporters of the Sherman Act were soon to suffer a disappointment. In the "Sugar Trust Case" (United States v. E. C. Knight), the Supreme Court held that a combination of sugar refining companies was not in violation of the terms of the act, even though the resultant combination controlled a very large part of the refined sugar of the country. Manufacture, according to the Court, was not commerce. The idea back of this conclusion was that manufacture may change the form of goods, but it does not change its place. Manufacture was distinct from transportation and from sale, and could not be brought under the commerce clause.

The principle in the E. C. Knight case still stands. Manufacture is not commerce. However, the practical effects of that decision have been much mitigated by subsequent decisions holding that a combination for the purpose of controlling interstate sales is subject to the provisions of the Sherman Act. In Swift and Company v. United States, a number of packers, controlling about sixty per cent of the trade in fresh meats in the United States, were charged with having entered into a combination to control competitive bidding among themselves and with making other arrangements with the ultimate purpose of monopolizing the supply and distribution of fresh meats. They were held subject to the anti-trust legislation (Swift and Co. v. U. S.). If the

courts should now be presented with the same state of facts as those in the Knight case, and it should be proved that the purpose of the combination was to control interstate sales, doubtless they would hold that the combination came within the prohibitions of the Sherman Act.

While the Knight case was a disappointment to the friends of the Sherman Act, that case was followed by others of a more heartening nature. In 1807, in United States v. Trans-Missouri Freight Association, the Supreme Court held that an agreement among certain competing railroad companies setting up a ratefixing body was prohibited by the Sherman Act. In 1904, in the Northern Securities case, a "holding company" to which shares of certain railroads had been transferred, with the effect of establishing a monopoly in transportation, was held to be illegal. An open combination of the roads involved in this case would clearly have been illegal. Therefore of a "holding company" was resorted to. To this company, shares in the roads were transferred so that it held a controlling interest in each of them. The roads, therefore, had not been combined into a single road, but they had been brought under a single control. The Court held that this violated the terms of the Sherman Act.

In 1908, a broad interpretation of the provisions of the act was made in the Danbury Hatters' Case (Loewe v. Lawlor). A combination of labor unions engaged in the boycott of a company which was manufacturing goods for interstate sale was held to constitute a violation of the act. This decision in effect interpreted the act as applying to any combination which restricted interstate commerce, even though the combination were not itself engaged in commerce.

Of all the decisions handed down under the Sherman Law, the greatest public sensation was created by the Standard Oil Case (Standard Oil Co. of New Jersey v. United States). In this case the Court laid down the principle that only contracts and combinations in "undue restraint" of trade were prohibited. This "rule of reason" was denounced in some quarters as an attempt by the Supreme Court to legislate. It was charged that where the act plainly said "every combination," the Court had prepared

the way for excepting combinations not deemed to be in "undue" restraint of trade. On the other hand, it could be answered that every business partnership or agreement was to some extent a restraint upon trade, and that certainly the act had not intended to prevent all these. The Court had, in fact, interpreted the Sherman Act in the light of the common law upon restraint of trade.

Much of the difficulty arose from the fact that the Sherman Act had been loosely drawn, using terms that once had had a definite meaning in law, but which had been used colloquially to express other meanings. For instance, "monopoly" originally referred to certain exclusive grants from the king, but in common usage had come to apply to the control of the major part of a particular commodity with a resultant control of prices. "Every combination" had been prohibited by legislators who could not afford the political effect of being anything less than out-and-out opponents of all "trusts"—another term with a narrow technical but broad popular meaning.

The effect of the Standard Oil decision was in reality to shift the emphasis in the question of business regulation from the mere matter of determining the existence of a combination to an examination of its purposes and effects. Later acts have tacitly recognized the necessity of this distinction by directing their restrictions at undesirable trade practices.

The Clayton and Trade Commission Acts

The next important effort on the part of Congress to regulate business was embodied in the Trade Commission Act of September 26, 1914, and the Clayton Act of October 15, 1914. They were before Congress at the same time and should be studied together.

The Sherman Act had been couched in general terms. The Clayton Act attempted to deal with specific problems. Moreover, it did not limit its prohibitions to combinations, but struck also at abuses perpetrated by individual concerns. In both these respects it represents a distinct departure in policy from the Sherman Act.

Section 2 of the Clayton Act prohibited price discrimination

"where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly," except that certain variations in price were expressly permitted, including discriminations "made in good faith to meet competition." The purpose of this provision was to prevent the practice, indulged in by large corporations, of lowering prices in one community in order to squeeze out smaller competitors in that area, while maintaining high prices elsewhere.

Another problem dealt with was the exclusive or "tying" contract. This had three principal forms. In one form the manufacturer of a "line" of products would require any retailer who handled these products to agree that he would not deal in the competing goods of other manufacturers. This manufacturer may have advertised one of his products so extensively that the retailer could not afford to omit it from his shelves. In order to procure it, however, he must agree to carry the manufacturer's whole line, even though some one or more of the individual commodities of that producer's output might be inferior to products offered by another manufacturer. Such contracts were harmful to the excluded manufacturers and to the public. In return for the restriction upon his choice of stock, the retailer was permitted to charge a certain fixed price for the goods.

Another form of tying contract was entered into by the manufacturer of machinery to be used in some particular business. Some of the machines made by this manufacturer might be essential to the business, no competing manufacturer having machines that would replace them. The remainder of his machines might be no better than those of competitors. However, in order to secure the indispensable machines, the purchaser was required to agree to use no machines of other manufacturers that would compete with any of his.

A third form of tying contract was one between the purchaser and the manufacturer of a machine that required the constant use of supplies. The purchaser agreed to use in connection with the machine only supplies made and furnished by the manufacturer of the machine, or agreed not to use any of these supplies in connection with a competitor's machine.

Section 3 of the Clayton Act makes tying contracts unlawful,

where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The influence of the labor unions and the farmers appeared in Section 6, exempting from the operation of the anti-trust laws, "labor, agricultural, or horticultural organizations" not having capital stock or not conducted for profit.

Section 7 prohibited "holding companies" where the effect is to "substantially lessen competition." As already explained, these were companies created for the purpose of purchasing the stock of other corporations, thus bringing about unity of action among these corporations. Section 7 also prohibited one corporation from acquiring control of another by purchase of stock, where the effect is to "substantially lessen competition." Section 8 prohibited "interlocking directorates," with certain exceptions, by prohibiting the directors of one corporation from accepting directorships in another.

In carrying out the provisions of this act, the Interstate Commerce Commission was given jurisdiction as to carriers, the Federal Reserve Board as to banks, banking associations, and trust companies, and the Federal Trade Commission as to all others.

At the same time that the Clayton Act was before Congress, another bill, known as "The Federal Trade Commission Bill," was under discussion. Most of the conflict upon this measure was between those who wanted a commission for purposes merely of investigation and publicity, and those who wanted one with powers of enforcement.

As finally passed, the act created a Federal Trade Commission of five members, appointed by the President with the advice and consent of the Senate, no more than three of whom should be of the same political party. The members were to serve for a term of seven years (except for four of the first appointees), not over one retiring in any single year. Their salaries were fixed at \$10,000 a year. The old Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations were abolished.

The success of the supporters of a "strong commission" appeared in Section 5, providing "That unfair methods of competition in commerce are hereby declared unlawful." The law

gave to the Commission power to enforce this provision against all except banks and common carriers, and fixed a procedure under which it should act. Other sections gave to the Commission power to investigate corporations, to require reports from them, to secure evidence, and to compel testimony. In 1938, the powers of the Commission were broadened by permitting its action not only in cases involving an unfair method of competition but also in those involving an "unfair or deceptive act or practice" in commerce, whether used as a method of competition or not.

The Trade Commission Act and the Clayton Act are both superior to the Sherman Act in that they do not limit their prohibitions to combinations but apply them to all persons engaged in interstate commerce. The Trade Commission Act is superior to the Clayton Act in that in broad, general terms it prohibits all unfair methods of competition and deceptive acts and leaves it to the Commission and the courts to determine whether they exist. It will be observed that the unfair practice or deceptive act need not necessarily involve dishonesty. Neither the Clayton Act nor the Trade Commission Act is a criminal statute, for the penalties apply only for violation of orders issued in pursuance thereof.

The Trade Commission and the Public Interest

The Trade Commission was established by Congress for the protection of the public, and not for the purpose of interfering in disputes that are of serious interest only to the disputants and which might be settled by recourse to the courts in the usual way. The Commission, however, has not been very severe in construing this limitation upon its proper jurisdiction.

The Commission in the Courts

The Trade Commission has had much difficulty in the courts in establishing the conclusiveness of its findings of fact. The Trade Commission Act provides that "The findings of the Commission as to the facts, if supported by testimony, shall be conclusive," and the Clayton Act contains a similar provision, but

the courts have not left to the Trade Commission so wide a field as is given to the Interstate Commerce Commission in similar cases. The courts have reserved to themselves the determination of whether a method of competition is unfair, or whether a practice may substantially lessen competition or tend to create a monopoly, thus leaving to the Commission the determination of "facts" in only a narrow sense of the word. The courts have not given a definition for unfair competition or clearly defined the phrase "unfair methods of competition," but pass upon individual cases as they arise.

Exemptions from the Law

Subsequent to the enactment of the legislation discussed above, two groups have been granted exemptions from some of its rigors. Combinations of exporters were exempted by the Webb Export Trade Act in 1918, both from the restrictions of the Sherman Act and those of Section 7 of the Clayton Act. The purpose was to give our exporters greater fighting strength against foreign competitors. Also, certain types of agricultural combinations were authorized by the Capper-Volstead Act in 1922, subject to the regulatory authority of the Secretary of Agriculture.

Types of Regulatory Problems

Cases coming before the Commission are of great variety, as might be expected from the ingenuity of business competitors in discovering methods of warfare. The work of the Commission can best be understood from a consideration of some of the problems which have confronted it and the Department of Justice in the prosecution of cases.

Tying Clauses. The nature of such contracts has been referred to in the discussion of the Clayton Act. The earlier decisions tended to uphold tying clauses. For instance, it was held that the manufacturer of a patented machine might sell or lease the machine on condition that only the manufacturer's accessory articles, such as stencil paper and ink, would be used in connection with it (Henry v. A. B. Dick Co.). Section 3 of the Clay-

ton Act tried to clear up the situation by prohibiting tying contracts where the effect was to "substantially lessen competition or tend to create a monopoly in any line of commerce." Under this section, the tendency of the courts at present is to hold tying contracts involving the use of accessories invalid.

Where the United Shoe Machinery Corporation manufactured patented machines essential to the shoe manufacturers a contract to use only unpatented machines of this company in connection with the patented machines was held to be illegal, as the practical effect was to lessen competition or create a monopoly (United Shoe Machinery Corp. v. United States). Where a company manufacturing patented machines required that only its patented cards be used in them, arguing that inferior cards would not be suitable and thus would destroy good will, the Supreme Court did not find that good will would be impaired and held the tying contract invalid (International Business Machines Corp. v. United States).

On the other hand, where competition is not substantially lessened or there is no tendency to create a monopoly, the contract does not violate the Clayton Act. Refiners of gasoline "leased" pumps at very low rentals to retailers on the understanding that only gasoline supplied by the lessor would be sold in those particular pumps. There was no attempt to prevent retailers from selling other brands of gasoline from other pumps. The Commission attempted to put an end to the practice, but was unsuccessful (Federal Trade Commission v. Sinclair Refining Co.).

Price Fixing. The manufacturer of a standard article may carry on an advertising campaign to stimulate the sale of his product. The success of his campaign may depend upon the fixing of a uniform price, low enough to stimulate sales with the public and high enough to give a reasonable profit to retailers. This fixed price may conflict with the policy of some retailers, especially chain stores and department stores, who may attempt to cut prices on these standard articles. The cutting of prices on standard articles is a favorite device for creating the impression that all products of a store are priced low. The cut price may be unfair to the manufacturer, to other retailers, and, ultimately, to the public. The interpretation of the law was in an unsatis-

factory state, and in 1937 an amendment to the Sherman Act attempted to clarify the situation, as well as protect the manufacturers from retail price cutting, by authorizing contracts or agreements prescribing minimum prices for the resale of a commodity bearing the brand or name of the manufacturer or distributor, provided the commodity was being sold in free competition with such commodities sold by others and provided such contracts were lawful as applied to intrastate transactions under state law Price-fixing agreements between competing manufacturers, distributors, or retailers are prohibited, however.

Most of the states now have acts permitting such contracts in intrastate commerce. As a matter of fact, despite this legislation it now appears that manufacturers are not on any large scale taking advantage of the opportunity thus afforded them. For one reason, a fixed price by one manufacturer encourages price cutting by competitors, and for another, it is not always easy to determine upon a fair standard price.

Price Cutting. When a corporation cuts prices in a particular community while maintaining them in other communities, the purpose may be to drive a local competitor out of business. Yet there may be times when sound business policy calls for selling at a low price or even at a loss. Other economic factors may call for variations in price between localities. Obviously then, the question of whether there has been a violation of law depends upon the motive of the selling corporation, and this may be a very difficult thing to determine.

To introduce an article, its price may be lowered temporarily, or in an intensive campaign samples may even be given away. On the other hand, the campaign may be an attempt to drive other companies out of business. The Clayton Act, in Section 2, provided, "That it shall be unlawful . . . to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce," except where there is a difference in the grade, quality, quantity, cost of selling, or transportation, "or discrimination in price in the same or different communities made in good faith to meet competition," with the further proviso that the act did not pre-

vent dealers from "selecting their own customers in bona fide transactions and not in restraint of trade" In some instances the Commission interfered in campaigns, such as the "free bread" campaign of the Ward Baking Company, under which the customer was given each day bread in equal quantity to the amount bought and paid for. The Commission was reversed in this case (Ward Baking Co. v. Federal Trade Commission).

An attempt to strengthen the law upon price discriminations was made in the Robinson-Patman Act of 1936. This act prohibits price discrimination between purchasers of the same commodity where such discrimination may substantially lessen competition or tend to create a monopoly, except that differentials may be made on the basis of the quantity of an order or on the basis of differences in the method of distribution which would actually affect costs. The act prohibits the granting of services to one customer not enjoyed by others and prohibits discounts, rebates, allowances, and advertising service charges to one purchaser as against others. It also prohibits sales in one part of the United States at lower prices than in others for the purpose of destroying competition, and sales at unreasonably low prices for this purpose.

Combination Sales. Retailers sometimes sell below cost a "leader," or well-known article with a national price, such as sugar, on condition that other articles, not so well known, be bought. Then the public is misled through clever advertising into believing that all the articles are being sold at a low price corresponding to that of the "leader," although in reality they are priced so high as to provide a good profit on the whole combination. The Commission has ordered an offending company to desist from offering such "leaders" at less than cost in a combination sale, upon evidence that the public had been misled as to the price of the remainder of the combination. Such an order is not valid, however, unless the advertising is deceptive, and therefore an unfair method of competition under Section 5 of the Trade Commission Act.

Improper Use of Names. When the name of a make of article has become well known and another manufacturer applies the same name to articles in an allied field, the public may con-

clude that both articles were produced by the same company. The name "Akron-Overland Tire Company, Inc.," adopted by a firm that rebuilds or retreads tires may be enjoined, where it appears that through the use of this name the public may be misled into the belief that the firm is associated with the manufacturer of the "Overland" automobile, who has registered "Overland" as a trade-mark for automobiles and who has advertised a car of that name widely over the country (Willis-Overland Co. v. Akron-Overland Tire Co., Inc.).

Misbranding At common law, the courts will not prohibit a manufacturer from placing a false and misleading label on goods where another manufacturer whose goods are properly labeled claims that he is injured thereby. This is due to the fact that the "unfair" practice is not aimed at a particular competitor. The manufacturer of "all-wool" suits who uses only wool cannot prevent a competitor from describing his cotton suits as "all-wool." The Commission here performs a valuable service, for it can proceed against the manufacturer who falsely labels his goods. It has been sustained in ordering a manufacturer not to use the word "Merino," "Wool," or "Worsted" on goods not made wholly of wool unless accompanied by a statement designating the other materials contained in the goods (Federal Trade Commission v. Winsted Hosiery Co.).

False Advertising. The Trade Commission receives many complaints in regard to false and misleading advertising. In fact, cases under this heading constitute the largest single group of cases coming before the Commission. While the Food and Drugs Act prohibits misbranding, it applies only to statements made on the article or its container, or packed with the article or referred to on the label or package. As a result, advertisements in periodicals frequently have contained broad statements not found on the bottles or containers. The Trade Commission may take action in such cases. It should be noted, however, that the Commission does not have a large staff of chemists and agents to assist in its investigations, as does the Food and Drug Administration. An interesting case, upholding a "cease and desist" order of the Commission, related to an article that was actually, according to expert testimony, common salt, of an im-

pure grade, but was advertised as containing sulphate of iron (redried), carbonized peat, charcoal, tobacco, quassia, sulphur, gentian, pure salt, chloride of magnesia, Epsom salts, Glauber's salts, bicarbonate of soda, oxide of iron, mineralized humoides, American worm seed, Levant worm seed, and capsicum (red pepper) (Federal Trade Commission v. Guarantee Veterinary Co.).

Under the original act, the action of the Commission in relation to advertising was limited to statements appearing as "unfair methods of competition." In 1938, the law was amended so as to prohibit the dissemination of an advertisement which is misleading in any material respect and is likely to induce the purchase of "food, drugs, devices, or cosmetics." The dissemination of such false advertisement is made an unfair or deceptive act or practice under Section 5 of the Trade Commission Act, and if the false advertisement would lead normally to use injurious to health or if the intent is to defraud or mislead, its dissemination becomes a misdemeanor. Federal control of the advertising of these commodities, therefore, is more complete than that over other articles, since it is not necessary that the false advertisement be proved to have been used as a means of competition.

"Priced-Up" Articles. In some cases the Commission has proceeded against concerns that regularly retailed an article for a much lower price than its marked price, thus leading the buyer to believe that he was getting a bargain. One interesting "price-up" case involved fountain pens and pencils, of which the marked price was \$10.00 for pens and \$5.00 for pencils. According to the findings, pens were sold at wholesale for \$1.00 each, and retailed at \$2.00 to \$2.50; and pencils were sold at wholesale for fifty cents each and retailed at from \$1.00 to \$1.25 (Federal Trade Commission v. Henry Lederer & Bros.).

Other Practices. The Commission has forbidden the use of terms leading the public into a false belief that goods have been purchased from the government or are of a brand "adopted" by it. "Rebuilt" articles must be labeled in such a way as to make clear the fact that they are not new, or at least they cannot be passed off as new.

Comment that unfairly represents the practices of a competi-

tor, even when the comment refers to a class and not to a single competitor, has been prohibited.

Other Legal Remedies

It will be noted that an action by the Federal Trade Commission is not always the only legal remedy where unfair practices are involved. Where an individual or company is being injured, it may be that speedier remedy might be found in a court of equity through an injunction. Moreover, damages may be secured through the courts, whereas the Commission may not go beyond an order to "cease and desist." The Commission is most likely to be useful where the public is the chief sufferer from an unfair practice or where individual action could not stamp out a widespread practice.

In some respects, the Department of Agriculture, in enforcing the federal Food and Drugs Act, has a broader jurisdiction than the Commission. It can include forfeiture of articles illegally transported and administers several other acts giving it broad powers. In addition, the Department has a force of scientific experts to assist it, whereas the Commission does not. In other cases, where the mails have been used to defraud, the Post Office Department can issue a "fraud order" and get quick action.¹ Moreover, the fraudulent use of the mails may be made the basis for a criminal action.

Trade Practice Conferences

An important function of the Commission is in connection with "trade practice conferences," a means by which representatives of an industry assemble under the auspices of the Commission to consider practices in that industry. In this way the Commission secures the expert opinion of the persons in closest touch with the industry upon the fairness or usefulness of various practices. A unanimous opinion, thus expressed, is given great weight by the Commission in determing what is and what is not a fair practice. When a conference has been determined upon, the whole industry is invited, and one of the Commissioners pre-

¹ See pp 171, 750

sides until the conference has chosen its own officers. The conference debates proposed resolutions, and the results are reported to the Commission, which may adopt and enforce them as rules for the industry or reject them.

In the absence of a trade practice conference it is sometimes extremely difficult for the Commission to determine whether a given practice is unfair. A conference affords a convenient means of determining this question, for it brings together informed opinion upon the problem. The question having been settled, the conference affords a means of reforming at one stroke the practices of an entire industry. The trade practice conference also is more just to the trade than litigation, for in many instances unfair practices have grown up without any desire on the part of most members of the industry to adopt them and will be given up willingly when the members know that the others can be depended upon to do the same. Nearly two hundred such conferences have been held.

Future Influence of the Commission

The Federal Trade Commission may become one of the most potent influences for good of all government agencies. While it is limited in its action to interstate and foreign business, there is a tendency for business activities to assume an interstate character.

The National Industrial Recovery Act

For a brief period it seemed that the Federal Trade Commission would be eclipsed by another body, the National Recovery Administration, as the chief regulatory body for the business of the nation. This epoch was brought to an end when the National Industrial Recovery Act, under which the National Recovery Administration came into existence, was held unconstitutional by the Supreme Court. A review of the history of this act will bring out the nature of some of the problems that modern conditions have created affecting the relationship between government and business.

Before the enactment of the National Industrial Recovery Act the regulatory activities of the federal government in relation to business had been limited primarily to the prohibition of contracts and agreements in restraint of trade, and the prohibition of unfair trade practices. Aid to businessmen had centered largely in the furnishing of statistical material, especially through the Bureau of the Census, and the carrying out of research into problems of business and the supplying of factual information in respect to markets and business methods, chiefly through the Bureau of Foreign and Domestic Commerce.

The depression of the late 20's and early 30's brought about an alteration in the attitude toward business. With a large part of the business and industrial enterprises of the country operating at a loss or with greatly reduced profits, the problem of recovery was largely one of placing these enterprises back into profitable production. Business men themselves, or at least a part of them, were desirous of bringing about a change in the relationship of government to business. In the first place, they wanted a machinery by which they could eliminate competitive practices which they felt were injurious. The trade practice conferences of the Federal Trade Commission had been helpful toward that end, but the Commission had been compelled to proceed within the limits of the acts by which the Commission was governed. In the second place, this section of business desired freedom from some of the restrictions of the anti-trust laws, so that agreements might be entered into between the members of an industry to eliminate harmful competitive practices.

At the same time that business men were putting forward these ideas, labor groups were demanding that wages be maintained, that hours of labor be reduced, and that working conditions be improved.

Along with these demands from business and labor, a number of theories, not all of them consistent, were current among the general public. One of these was the theory that wages should be kept high so that purchases of goods would increase, with a resultant stimulation of business and ultimate recovery from the depression. Another was a "share-the-work" theory, which called for a reduction of the working hours of employed persons, so that vacancies might be created for the unemployed. There was also a theory to the effect that the depression had been caused

by overproduction in industry or overproduction in proportion to demand. The proposed remedy was reduction of the output of industry on the one hand, and stimulation of buying power through such devices as increased wages on the other.

All of these theories ultimately found some expression under the National Industrial Recovery Act.

The act was signed by the President in June, 1933. Its two important phases were, first, provisions under which the members of any particular industry might draw up a code of fair competition for that industry, and second, provisions which became the basis for the President's Re-employment Agreement.

Codes were subject to approval by the President and must meet certain conditions set forth in the act. Important conditions were that the group drawing up the code should impose no inequitable restrictions upon admission to membership in the group, that the code should not promote monopolies or permit monopolistic practices or discriminate against small enterprises, and that the President might require, as a condition to his approval, provisions to protect consumers, competitors, employees, and others. Every code must recognize the right of employees to organize and bargain collectively without interference, must provide that no employee or one seeking employment should be required to join a company union or refrain from joining a union of his own choosing, and must require that employers comply with the maximum hours, minimum rates of pay, and other employment conditions as approved or prescribed by the President. An approved code was to govern not only the group which drew it up but the other members of that industry. If the industry should not prepare a code, the President was authorized to draw one up on his own initiative.

Violation of the terms of a code was made an "unfair method of competition" within the meaning of the Trade Commission Act and thus was brought within the jurisdiction of the Federal Trade Commission. In addition, violation was made a misdemeanor, with a penalty of not over \$500 for each offense, with each day of violation constituting a separate offense.

Under the provisions of this part of the act, codes were formulated for each industry. The preliminary draft of a code was

first drawn up by members of the industry. Conferences with representatives of the National Recovery Administration, the federal administrative body under the act, were then held, so that the code might be put into a form acceptable to the President. After this, the code was presented to the President for approval.

The codes as actually drawn up were not uniform in their provisions, since the conditions within each industry were not the same as those in other industries. In general, it can be said that they included the mandatory provisions required in the law, and in addition, a prohibition upon child labor, maximum working hours for each week, and a minimum wage. Sometimes they included a limitation upon the total output of the industry with provision for allotments of quotas to the members of the industry, or provided for the fixing of prices upon the products of the industry. Rules upon methods of competition varied with the needs of each industry, but might deal with such matters as cash discounts, service charges, grading of products, advertising practices, bribery of competitors' employees, and branding and labeling of goods. Code authorities within the industry were established to supervise administration of the code provisions.

In respect to fair trade practices, codes under the N.R.A. resembled closely the trade practice rules drawn up by trade practice conferences under the auspices of the Federal Trade Commission. In fact, the latter also had been referred to as "codes." The codes of the N.R.A., however, were more numerous and more quickly prepared, and in addition to the fair trade features, carried the labor and other provisions.

The second important phase of the administration of the act was in relation to the President's Re-employment Agreement, or the "blanket code." Authority for the blanket code was found in a provision of the act giving the President power to enter into and approve voluntary agreements among persons engaged in a trade or industry, labor organizations, and trade or industrial groups. Unlike the codes, which became binding upon all the members of an industry whether they had participated in its formulation or not, the Re-employment Agreement was based upon the consent of each employer. It called for the abolition

of child labor, a maximum of 35 to 40 hours a week, a minimum wage varying under different conditions, with higher wages for higher grades of work, a limitation upon price increases, and cooperation with other signatories to the agreement. Substitution of code provisions as an alternative to the provisions of the Reemployment Agreement was permitted under some circumstances. The purpose of the Re-employment Agreement apparently was to secure wage increases and increased buying power on the part of employees and to prevent price increases that would counteract the effect of this increased buying power. The agreement was expected to bring about quickly a movement toward recovery without waiting for the slow process of code formulation. Persons who accepted the agreement were entitled to display the Blue Eagle upon their products. The Blue Eagle campaign was spectacular and emotional. The press, the radio, and the rostrum were resorted to, and employers were subjected to argument, appeal, and pressure. Whatever one may think of the economic merits of the blanket code, the Blue Eagle campaign will be remembered as one of the most colorful efforts to achieve an end through emotionalism and pressure salesmanship that the country has known.

The National Recovery Administration, with its code structure and the Blue Eagle drive, ran into more and more trouble as the emotional effects of the early part of the campaign wore off and as difficulties in enforcement began to appear. The suspension of anti-trust law restrictions was criticized in some quarters. Difficulties were enormously increased through the fact that small as well as large industries at first were brought into the scheme of control. Subsequently, industries in small towns were exempted from some of the restrictions of the plan. A final determmation as to whether the N.R.A. was to be retained, modified, or abandoned, on the basis of its merits, was made unnecessary by the Supreme Court in the case of the Schechter Poultry Corporation v. United States. This case involved the constitutionality of the live poultry code in New York City, which fixed at forty the maximum hours of workers in the industry, provided a minimum wage of fifty cents an hour, prohibited the employment of children under sixteen, provided for collective bargaining with

employees, and fixed the minimum number of employees in any slaughterhouse, the number being graduated according to weekly sales. Other provisions regulated trade practices. One of these provisions of interest in this case, required "straight killing," which might better be called "straight selling," since it required that chickens be sold by the coop or half coop. Thus, purchasers were not permitted to select individual birds, but must select by the coop or half coop as graded by the seller.

Ten of the counts in the cases included in the Schechter decision were for violation of this provision, two were for making sales without an inspection by the city authorities, two were for making false reports or the failure to make reports, one was for sales to unlicensed slaughterers, and one was for selling an unfit chicken.

In its opinion, the Court rejected the theory that the crisis under which the law was enacted could be a Constitutional justification for the law. The Court pointed out that while extraordinary conditions might call for extraordinary remedies where there is authority to act, no conditions, however extraordinary, can justify an action where there is no authority.

The Court held the provisions of the code to be beyond the powers of the federal government in the regulation of commerce, since the code dealt with intrastate and not interstate business. The goods were not a part of the stream of commerce passing from other states through that state and going on to other states, such as had been found in the Stockyards Case,² for they were consumed in New York. Neither did the transactions in New York directly affect interstate commerce as had the local rates in the Shreveport Case.³

In addition, the Court found in the act an attempt to delegate legislative power to the President in violation of the Constitution. The power to approve or to draw up codes was in effect a power to legislate upon commercial and industrial activities. For all these reasons the act was unconstitutional. With this decision the National Recovery Administration went out of existence.

² See p 568.

³ See p. 571.

Revival of Features of the National Industrial Recovery Act

Some of the provisions of the National Industrial Recovery Act have been incorporated in subsequent legislation dealing with specific industrial problems. The laws upon the bituminous coal industry re-enact in different form some of the provisions of the old coal code.⁴ The National Labor Relations Act revives some of the labor provisions of the codes,⁵ and the Walsh-Healey Act in effect formulates a code for national contractors.⁶

The State and Business

Despite the great activity of the federal government in the regulation of interstate business and the tendency of the courts to extend the limits of interstate commerce, the states are important factors in the development and regulation of business.

Anti-Trust Laws

Most of the states have anti-trust laws either similar to the federal laws or specifically directed against particular illegal practices. Usually they prohibit price discriminations between different areas not justified by differences in the costs of distribution, exclusive contracts, and price cutting. Sometimes farm and labor groups are exempted from the operation of these laws.

Corporations

The states may bring corporations into existence. The business corporation is a device that ranks with the steam engine in its importance to modern industry. Without the corporation in its present development our existing complicated business structure would be impossible. It has two important phases—the idea of a partnership in which the funds of many persons are pooled and the idea of an independent personality. In a simple partnership each shareholder would be liable for all the debts of the company.

⁴ See p. 698.

⁵ See p 661.

⁶ See p 665.

The idea of an independent personality corrects this. It involves a legal fiction, through which a group of people are regarded, for certain purposes, as a single person, capable of suing and being sued. Since it has an entity independent of the shareholders, they are not liable for its debts, except for their investment in the corporation, unless made so by law.

Since a corporation is thus the result of the fiat of the state which has created a new personality, it is peculiarly subject to state control. While the corporation is one of the fundamentals in modern life, it is subject to abuse. So powerful an instrument uncontrolled may be dangerous in proportion to its strength. The growth of the corporation has been paralleled by increased state regulation of industry, not because of the defects of corporations but because of the complicated industrial society they have made possible.

Most of the companies engaged in business are incorporated under state laws. This is true even of those organizations that plan to engage in interstate commerce. A corporation organized in one state cannot be excluded by another state from engaging in interstate commerce within its borders. On the other hand, if it plans to enter another state for the purpose of engaging in intrastate commerce, it may be excluded or required to meet conditions laid down by that state, for a corporation does not benefit by the "comity clause." However, once admitted, such a "foreign" corporation may not be subjected to arbitrary discriminations as compared with domestic corporations.

The state which grants the charter of incorporation may either set up severe corporate regulations or be lax in its requirements. Whatever its regulations may be, corporations created by it are invested with the same interstate rights that are possessed by corporations of other states. Certain states have taken advantage of this situation and have thus become the great purveyors of corporate rights. Organizations in search of corporate privileges have flocked to these states for the purpose of procuring charters. Thus, the state of Delaware, with "liberal" corporation laws, has become the "little home of big business," and derives a large income from its fees for incorporation and its annual franchise tax.

⁷ See p 388.

Its lawyers profit from the business of the numerous corporations of the state, receiverships are a rich source of revenue, and even its hotels profit from the constant meetings of stockholders. However, Delaware is not alone in the business of creating corporations. A number of other states provide substantial competition.

Business Affected with a Public Interest

The state, under its police power, possesses extensive regulatory authority. This is subject, however, to the provisions of the federal Constitution, particularly the restrictions of the Fourteenth Amendment.⁸ As applied to interstate commerce, the state regulatory powers are limited in extent.⁹

Not all forms of business are subject to the same degree of regulation. Those "affected with a public interest," and particularly enterprises which enjoy special privileges, such as franchises granted by the state, are especially subject to control. Thus, railroads, gas and electric companies, and other public utilities may be regulated to the extent of having their rates fixed by a state commission, provided they are not denied due process of law. In general, other businesses are not subject to price fixing. However, in emergencies the state may have this power. Moreover, in at least one case, involving price fixing on milk, the Supreme Court has upheld the state law, even though the milk business does not belong to the group of industries ordinarily regarded as "affected with a public interest." 12

Nearly every state has a public utility commission, usually appointed but often elected by the people. The jurisdiction and powers of these commissions vary. Railroads, gas companies, electric companies, street railways, bus companies, and telephone companies ordinarily come under their jurisdiction. Both rates and services are subject to regulation, even to the extent of requiring approval by the commission of changes in car schedules

⁸ See p 531.

⁹ See p 573

¹⁰ See p 549.

¹¹ See p. 550.

¹² See p. 552

in the case of street railways. Stock issues may require the approval of the commission, which should be on the alert for anything in the nature of "watered stock," that is, stock carried as having been sold for an amount far beyond the sum it actually brought. However, railroad regulation has been so encroached upon by the federal government through expansion of the term "interstate commerce" that state regulation of this means of transportation has been reduced to a minimum.¹³ The telephone system, likewise, has become in large part an interstate utility. A similar tendency may be expected as bus companies integrate into large interstate organizations. The growth of the holding company in the electric utility field has tended to remove these utilities from state jurisdiction, but the federal Public Utility Act of 1935 has put some brake upon this tendency.14

Security Issues

In the regulation of security issues the states entered the field long before the federal government. "Blue sky" laws were enacted in nearly every state in order to protect the public from the wiles of the vendors of worthless stocks sold to innocent small investors under false representations. No such laws can prevent foolish investments. They cannot guarantee the worth of any security. However, they can prevent or discourage misrepresentation upon the facts connected with issues of securities. A few states have given authority to a state officer or securities commission to prevent the sale of fraudulent issues, either by requiring approval of issues before they are offered to the public or by authorizing court action to prevent their sale. Other states have relied upon the requirement that companies offering securities file statements showing the organization, assets, and financial status of the company and other pertinent facts. Others merely require that dealers in securities register and secure a license, which license may be revoked where the licensee is guilty of fraud or of violating the regulations.

While these state laws were helpful in reducing the losses of

¹³ See p 561. ¹⁴ See p 706.

innocent investors, they were limited in effect. Sales in interstate commerce could not be prevented. Moreover, the task of providing an adequate investigation in each state for all the vast number of securities offered for sale was too great a burden to be carried out thoroughly and the duplication of investigations in each state too expensive if properly executed. However, it required the great depression, with its tremendous losses in security values, to make the public conscious of the need for federal regulation. The federal Securities Act of 1933 then was enacted.

The federal act is based upon the control of interstate and foreign commerce and the control of the mails. It requires the registration of securities, with certain exceptions, if they are to be sold through interstate commerce or through the mails. Thus, if a security is not registered, letters or interstate telegrams and telephone messages could not be used in effecting its sale, and the mails or facilities of interstate transportation could not be used to carry the security. Purely intrastate transactions, where the issuer is a resident of the state and doing business therein, or is a corporation of that state and the purchaser is a resident of the same state, are excepted.

The registration statement includes detailed information upon the financial status of the company, and copies of contracts affecting the securities to be sold.

The penalties in this act are severe and inclusive. If the registration statement contains an untrue statement of a material fact or omits a material fact, an injured person may sue every person who signed the registration statement, every person who was a director or partner in the company at the time the statement was filed, every accountant or other person who contributed professionally to the statement, and every underwriter for the security. Even a salesman who sells securities in violation of the law or who makes use of statements that he might reasonably be expected to know were false is liable for the securities sold by him. Certain exceptions are made from these provisions, however, with the purpose of removing liability where obvious injustice would result. The original law placed enforcement with the Federal Trade Commission, but in 1934 the Securities

Exchange Act transferred jurisdiction to a new body, the Securities and Exchange Commission.

In addition to making this change, the act of 1934 gave to the Securities and Exchange Commission regulatory powers in relation to securities exchanges and over-the-counter securities mar-The sale of securities, when not taking place in interstate commerce or through the mails, would normally be regarded as a matter for state jurisdiction, but the federal act was based upon the need to protect interstate commerce, the national credit, and the national taxing power, and upon the need to protect and make more effective the national banking system and the Federal Reserve System. The act included a somewhat lengthy explanation of the relationship of securities exchanges to these ends, pointing out that the transactions in large part originate outside the states in which the exchanges are located and are effected by the use of the mails or the instrumentalities of interstate commerce; that in large part the issuers are engaged in interstate commerce; that they involve the use of credit and thus affect interstate commerce and the national credit; that the prices fixed at exchanges affect the tax collections of the federal government and the collateral for bank loans; that manipulation of the price of securities brings price fluctuations that affect credit, interstate commerce, taxes, and bank loans; and that these fluctuations encourage national emergencies which dislocate interstate commerce and the general welfare. The act then proceeded to set up a Securities and Exchange Commission of five members, appointed by the President by and with the advice and consent of the Senate.

The commission was given authority to register exchanges, which must agree to enforce regulations under the act upon margins, extensions of credit, borrowing by members of exchanges, manipulation of prices, excessive trading, and other practices. The commission was given authority to suspend or withdraw the registration of exchanges violating the regulations, expel members, suspend trading for ten days or, with the approval of the President, suspend all trading on any exchange for a period of ninety days.

Enforcement of the act was placed with the commission, ex-

cept that margin requirements, extensions of credit, and borrowing by members of exchanges are to be controlled by regulations of the Federal Reserve Board. Appeals from decisions of the commission to the courts were provided for, but the findings of the commission upon the facts, if supported by substantial evidence, were made conclusive. The act prohibits the use of the mails or the instrumentalities of interstate commerce for the purpose of using any exchange that is not registered under the act or has not been exempted from registration.

A further protection to investors was afforded by the Public Utility Act of 1935, affecting holding companies for electric and gas utilities. In these particular industries the device of the holding company had been carried to such extremes as to create a maze of holding companies which held interests in other holding companies, so interrelated that the investing public could not know what lay back of their securities. The collapse of certain of these systems and the resultant losses to thousands of investors centered public opinion upon the ill consequences of the system, and the act of 1935 was the result.

This act, like the Securities Exchange Act, contained a defense of its constitutionality, pointing out that the securities of public utility holding companies and their subsidiaries were marketed through the mails and the instrumentalities of interstate commerce; that their services and sales were made through these same agencies; that their subsidiaries often transported in interstate commerce; that their practices affected interstate commerce; and that their activities extended over many states and could not well be controlled by state action. The Securities and Exchange Commission was given authority to register these holding companies, but might exempt those predominantly in intrastate commerce and certain other types. Unregistered companies were prohibited from engaging in interstate commerce or using the mails or the instrumentalities of interstate commerce. In the future, securities offered by holding companies and their subsidiaries must be approved by the commission. In addition, the commission was directed to limit the operations of any holding company to "a single integrated public utility system," and to such other businesses as were reasonably incidental, except under authorization of the commission. The commission also was directed to take steps toward the simplification of the corporate structures so that any "holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company." This rather involved phrase embodies the so-called "death sentence," for it prohibits a holding company in the third degree. There is provision for appeal to the courts upon orders of the commission, but its findings as to the facts are made conclusive if supported by substantial evidence.

By these various acts the Securities and Exchange Commission has been given substantial powers of control over the sale of securities and securities exchanges and has been given special powers in relation to holding companies which will make it possible for the investing public to know more definitely what they are buying when they purchase gas and electric securities.

Liquor Sales

With the repeal of the Eighteenth Amendment most of the states have legalized the sale of alcoholic drinks. Some states have set up a system of state liquor shops and thus have direct control of the business. Others permit private sales under a system of licensing and strict regulation.

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CHAPTER XXXII

Federal and State Powers Over Money and Banking

The Control of the Currency

The Constitution does not specifically give to Congress the power to control the currency. Yet there are few subjects over which the control of Congress is more complete. It is one of the implied powers, or rather, it belongs to that group which sometimes are designated as "resulting" powers, that is, powers that are not implicit in any one clause of the Constitution but nevertheless may be drawn from a combination of different powers.

The following clauses bear closely upon this subject: "The Congress shall have Power . . . To borrow Money on the credit of the United States . . . To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; To provide for the Punishment of counterfeiting the Securities and current Coin of the United States" (Article I, Section 8); "No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts" (Article I, Section 10).

Corns

The dollar adopted as a standard by the United States was of nearly the same value as the Spanish dollar usually referred to as the "piece-of-eight," a coin which was much in use in our early history when the trade with the Spanish West Indies brought large amounts of Spanish coin into the English colonies. The dollar at present is a gold unit, although it is not now coined in gold. At the time the country discontinued the coinage of gold pieces in 1934, the only gold coins were for two and a half,

five, ten, and twenty dollars. In addition, gold bars, properly stamped as to weight and fineness, were made for jewellers and for use where transfers of large amounts were desired, particularly in international settlements. Such bars are still made for use in the arts and for use in international settlements.

The dollar is coined as a silver piece weighing 412.5 grains, of which one-tenth is alloy. Normally its value as bullion is only about half its value as currency, fluctuating with the price of silver. This is true because gold is the standard, and silver in the open market is priced in terms of gold like any other commodity. Since the amount of silver in the coined dollar is fixed, its value melted down as bullion will fluctuate with the market price for silver. The amount of silver in the dollar is so low, however, that only when silver is selling for an abnormally high price in terms of gold will the metal in the coined dollar approach the value of a dollar in gold. If the amount of silver in the coin were not kept low, there would be a possibility that with a rise in the price of silver the coined dollar would become worth more than a dollar in gold, with the attendant danger that persons would melt them down to be sold as bullion and the coins would disappear from the market Other silver coins are the half-dollars, quarters, and dimes. The amount of silver in these coins is so small that they are worth as bullion proportionately less even than the silver dollar.

The five-cent piece is composed of copper and nickel, and the one-cent piece of copper, tin, and zinc. Their value as bullion is proportionately still less than that of the silver coins.

It is clear, then, that none of our metallic money is actually of the intrinsic value it purports to be. To the extent of the difference between its value as bullion and its face value, it is no better than paper money. If gold coins actually were issued, of course, they would be worth exactly their stated value, since gold is the standard.

Paper Money

In addition to the coins, there is paper money of various kinds. Gold certificates are issued against their full value in gold coin or bullion in the vaults of the Treasury. At present they are not

in general circulation but are in large part held by the Federal reserve banks as reserves, even though they may not in fact be converted into gold at the Treasury On their face the gold certificates are little different from warehouse receipts for gold held in the Treasury, but the Supreme Court has held that they are not in fact warehouse receipts but ordinary currency.1 Silver certificates are issued against silver dollars held in the Treasury, for which there is a dollar in silver for each dollar represented by a certificate. The certificates may be exchanged for the coins. Another form of paper money is the Treasury note. Only a small amount in Treasury notes is in circulation, and they are being retired when turned in at the Treasury. United States notes, or greenbacks, are limited in amount to not more than \$300,000,000 for currency purposes. National bank notes were the result of the government's need to dispose of bonds during the Civil War Certain banks, called national banks, were permitted to issue circulating notes to the value of government bonds which they purchased and deposited in the Treasury. Certain additional deposits also had to be placed in the Treasury. At present these notes are being retired and eventually there will be none in circulation.

Federal reserve bank notes formerly were issued under terms similar to those governing national bank notes. They too are being retired.

Federal reserve notes (not to be confused with Federal reserve bank notes) constitute the "elastic" or flexible element in our monetary system. None of the other currency fluctuates in amount with the demands of business. Federal reserve notes are the only form of currency in this country that expands and contracts from time to time as the need for credit increases and decreases. Coming into existence with the Federal Reserve Act of 1913, the Federal reserve notes have become one of the most interesting factors in our system of money and credit.

The Issuance of Federal Reserve Notes

Reduced to simple terms, the idea behind the Federal reserve notes is this:

¹ See p 642.

If certain businessmen desire to borrow, say, \$100,000 from a member bank of the Federal Reserve System, the bank may accept their promissory notes or other commercial paper. If this paper is of the kind permitted under the regulations for such purposes, the bank will "rediscount" it with the Federal reserve bank of that district. The Federal reserve bank will deposit sixty per cent of the notes, totaling \$60,000 of their face value, with the United States government. To this it will add forty per cent of the total of \$100,000, or \$40,000, in gold certificates, which gold certificates are also held by the United States government. There will then be issued to the Federal reserve bank federal reserve notes totaling the combined amount of the notes and gold certificates that have been deposited, that is, \$100,000. The Federal reserve bank will turn these over to the member bank (which must pay the Federal reserve bank for this service according to a "rediscount rate," which is similar to an interest rate). The member bank will pass the Federal reserve notes on to the businessmen or retain them and credit the amount to the accounts of the businessmen to be checked upon. When the promissory notes are paid off, they are returned to the businessmen, the gold certificates are returned to the Federal reserve bank, and the money obtained by the member bank through the Federal reserve bank is returned to the latter, which then turns over \$100,000 in Federal reserve notes or any other currency to the United States government. Thus, the need of business men for currency or credit is met and the amount of currency or credit is contracted when the need has been satisfied. It should be added that at the present time not only "commercial paper," which in banking terms has a technical and restricted meaning, may be accepted as the basis for the original loan, but government bonds and other "sound" assets may be used.

Now, the Board of Governors of the Federal Reserve System can approve or reject the percentage or "rediscount rate" charged by the Federal reserve bank. By raising or lowering the percentage the borrowing of money can be discouraged or encouraged, in accordance with the policy that is deemed best at any particular time. Variations in the discount rate, however, have not been a very effective deterrent to speculation, partly perhaps

because the variations must be small. To this extent the Federal Reserve System has been somewhat of a disappointment, for there were some who had hoped that with the inauguration of the plan a means was at hand to prevent those periods of wild speculation that seem to come periodically in the business world and are followed with such disastrous results. As each such period returns, men forget the experience of the past, or hope that luck will be with them, or convince themselves that this new epoch is different from all the others. No means has been devised to restrain these tides of speculative activity. Such periods come to a close only when the top-heavy structure of credit crashes, giving us another financial crisis, followed by a long period of adjustment known as a "depression."

Credit Through the Federal Reserve System

The provisions for issuance of Federal reserve notes are not the only means by which the Federal Reserve System provides credit to business men. It is permissible for a member bank to discount commercial paper with the Federal reserve bank of its district, which may then, after placing behind it a reserve of thirty-five per cent in gold certificates or currency, put the amount upon its books to the account of the member bank. This sum then becomes a part of the deposits of the member bank to be used as a basis for loans. Since a bank may loan upon its deposits to an extent several times the amount of these deposits, the effect of this transaction with the Federal reserve bank is to create potential credit which may be several times the amount of the commercial paper involved.

Legal Tender

The federal government issues or authorizes the various forms of paper money under the general implied power to control the currency. The question of whether it could invest such paper with the quality of legal tender was long questioned. In Hepburn v. Griswold, it was held that this was not permissible, at least as applied to debts contracted before the passage of the legal tender law. In Knox v. Lee, however, this decision was

reversed in a decision involving the war powers of Congress, and finally, in Juilliard v. Greenman, the power to give a legal tender character to paper issues was upheld as being among the ordinary peacetime powers of Congress, derived from the power to borrow money, and to regulate the value of money, and other recognized powers of the federal government, as well as from certain prohibitions on the states, such as the prohibition against coining money and emitting bills of credit.

At present all the forms of currency, both coin and paper, are by law full legal tender, that is, they may be used without restriction upon the amount in the payment of all debts, public and private, and of all taxes, where a payment in money is called for.

New Deal Monetary Measures

The monetary measures of the administration of President Franklin D. Roosevelt extended still farther the federal powers over the currency. One of these measures required all individuals to turn in to the Treasury their gold coins and gold certificates, in return for which they were given the equivalent in currency. At the present time the gold of the country is held by the Treasury, except such as is used in the arts. All payments in gold are prohibited, except where bullion is transferred to other countries in order to meet the balances in international payments. Another measure abrogated the "gold clauses" in both private and governmental obligations. These clauses were agreements by which individuals or the government as borrowers had agreed to meet their obligations by payments in gold coins of a certain weight and fineness.

The calling in of gold was followed by another measure, reducing the gold content of the standard dollar. This was done by the President under acts of Congress in 1933 and 1934 which authorized him to reduce the gold content of the dollar by not less than forty per cent nor more than fifty per cent. Under this authorization the President in January, 1934, reduced the weight of the standard gold dollar by 40 94 per cent. The old standard dollar had consisted of 25.8 grains nine-tenths fine, while the new dollar contained 15 ½1 grains nine-tenths fine.

It must be remembered, however, that no gold dollars were available at this time. The new weight referred to a "standard" gold dollar, which in fact was not available in any weight, since all gold coin had been called in.

The Gold Clause Cases

It was under these circumstances that the Gold Clause cases arose. These cases fell into three groups: those involving gold clauses in private bonds (Norman v. Baltimore and Ohio Railroad Company, and two other cases, all considered together); one involving a gold certificate (Nortz v. United States); and one involving a federal bond (Perry v. United States). A separate opinion was handed down by the Supreme Court upon each of these three classes of cases.

The first of these opinions dealt with the gold clauses in private bonds. Those involved in the Norman case were typical. They provided for payment of the bonds in gold coin of the United States of the standard of weight and fineness existing on February 1, 1930. Norman, the owner of the bond in this case, was not insisting that the payment of interest due him be made in gold. He was willing to accept as an alternative, payment in currency representing the total amount of gold, that is, \$1.69 for each dollar called for in the bond. The Court rejected this claim for an increased number of dollars, basing its decision upon the broad power of the federal government to control the currency. Since Congress possesses the power to control the currency, it may on grounds of policy alter the gold content of the standard dollar. All contracts entered into are subject to the exercise of this Congressional power, and if in violation thereof, they are invalid. The Court also said that the gold clauses under consideration were contracts for payment in currency and not contracts for the delivery of a certain number of ounces of gold. The Court concluded: "We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority. The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and States and municipalities, may make and enforce contracts which may limit that authority Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed."

The Nortz case involved a gold certificate. These were obligations of the United States certifying on their face that they were payable to the bearer in gold coin which had been deposited in the Treasury. The Court said that despite the statement on their face, they were not warehouse receipts for gold coin. The Court held them to be currency. As such, they were subject to the control of Congress. This decision followed the principle laid down in the Norman case.

In the Perry case, involving federal bonds which had provided for payment in "United States gold coin of the present standard of value," the Court followed an entirely different line of reasoning. The bonds had been issued by the United States under its power to borrow money on the credit of the United States. The question was whether the power to control the currency could be used as an excuse to alter the terms of an obligation incurred under the power to borrow money, making the credit of the United States "an illusory pledge." The Court said that this could not be the case. The pledge involved in the bond was valid. However, suit against the United States could not be brought without its consent. Under the law such suit would need to be brought in the Court of Claims, and the Court of Claims had no authority to entertain an action for merely nomi-

nal damages. The question still remained whether the holders of these bonds had suffered actual, and not merely nominal, damages. It had not been shown that the holder of the bond in the case before the court had actually suffered a loss in buying power when paid only in dollars of the number called for in the bonds. Under the circumstances he was not entitled to the increased number of dollars.

The effect of these decisions was to uphold the power of the federal government, under its control of the currency, to call in the gold of the country and to alter the gold content of the standard dollar. In its applicability to private contracts and gold certificates, this was entirely valid. In relation to federal bonds, it was not valid, but until actual damages were shown, the bondholder had no remedy.

The Bank of the United States

Under the leadership of Alexander Hamilton, Secretary of the Treasury, the first Bank of the United States was established in 1791. It was a government bank only in part. In a total of ten million dollars worth of shares, only two million were owned by the United States, and even these had been sold by 1802. The bank was chartered by the United States for a period of twenty years. The first charter was not renewed upon its expiration, but in 1816 a second bank was established. It was not until after this had occurred that the question of the constitutionality of the incorporation of a United States bank was raised in the courts and then it came up incidentally in a case involving the right of Maryland to tax the circulating notes of all banks therein not chartered by the Maryland legislature (McCulloch v. Maryland). John Marshall wrote the decision, declaring the act of the Maryland legislature unconstitutional because it permitted a state to tax a federal agency, and upholding the right of the United States to incorporate a bank as a power reasonably to be implied from such express powers as the power to collect taxes, to borrow money, and to carry on war. Under the leadership of Andrew Jackson the United States discontinued its relations with this second bank.

The Independent Treasury System

For a period after this the federal funds were placed in state banks. In 1840, an independent treasury system was provided for by law, but the act establishing it was repealed in 1841. In 1846, another act provided for an independent treasury system All government transactions were conducted in hard money. The United States kept its money in its own vaults in the Treasury and the subtreasuries that were set up in various cities.

The National Banking System

During the Civil War, the national banking system was established, partly for the purpose of disposing of government bonds and partly for the purpose of providing a stable paper currency. National bank notes have been discussed earlier in this chapter. The national banks thus established are under the supervision of the Comptroller of the Currency. The system was not nearly so successful in disposing of government bonds as had been hoped. State banks were slow in becoming members of the system until 1865, when Congress placed a tax of ten per cent on the circulating notes of state banks. After this the number of national banks increased rapidly. The constitutionality of the tax (re-enacted in a somewhat amended statute of 1866) was upheld as an exercise of the power of the general government to provide a national currency. This power was assumed by the Court to proceed from the power to provide coins and to issue bills of credit (Veazie Bank v Fenno).

The national banking system did not prove satisfactory. It did not provide an "elastic" currency or a system of centralized reserves that was suited to modern conditions, and was inadequate in other respects.

The Federal Reserve Act

The Federal Reserve Act of 1913 provided for a complete reorganization of the banking system of the country. It did not go the full length of setting up a Bank of the United States to correspond with the central banks of other countries, but it attempted to accomplish much the same results. Under this act, the country is now divided into twelve districts, each containing a Federal reserve bank. Every national bank in a Federal reserve district must become a member bank and state banks may do so. Each Federal reserve bank has nine directors. Three are chosen by the member banks without restriction (class A), and three are chosen by member banks from persons engaged in commerce, agriculture, or "other industrial pursuit" who are not officers, directors, or employees of any bank (class B). The member banks are divided into three groups according to capitalızatıon—large, medium, and small—and each group chooses one director for class A and one for class B. The remaining three directors constitute class C, and are chosen by the Board of Governors of the Federal Reserve System. The idea is that the Government, the banks, and the public shall be represented. In addition, there is a Board of Governors of the Federal Reserve System (formerly the Federal Reserve Board) of seven members. They are appointed for staggered terms of fourteen years by the President with the advice and consent of the Senate, but are removable for cause by the President. One of the members of the board has the title of chairman and is the executive officer of the board. He is named by the President and his term as chairman is four years. There is also a vice-chairman chosen by the President for the same term. The salaries and expenses of the board are paid by a levy upon the Federal reserve banks. The Board has broad powers of supervision over reserve banks.

The provision for an "elastic" currency through the issue of Federal reserve notes has been discussed.²

This reorganization brought about a distinct improvement in our banking organization and the Federal Reserve System proved its worth in the test of the World War that came soon after its establishment.

The authority of the federal government to organize the Federal Reserve System can be found in the same process of reasoning by which Marshall justified the Bank of the United States in McCulloch v. Maryland, and in its recognized power to control the currency.

² See p 637.

Emergency Banking Laws

The national emergency that became acute in late February and early March of 1933 led early in March to the enactment of the Emergency Banking Act, which was designed primarily to deal with the emergency. The administration already had closed the banks of the country to prevent "runs" resulting from a nationwide panic. The action had been taken under an old law of 1917, and its legality was not clear. The act of 1933 confirmed the actions of the administration and extended the authority to close member banks of the Federal Reserve System during future emergencies. To aid banks in distress, the Reconstruction Finance Corporation was authorized to subscribe to preferred stock in such banks Moreover, for the existing emergency, a new issue of currency was authorized, differing from ordinary Federal reserve notes in that it might be based upon obligations of the United States rather than upon commercial paper. Fortunately, it did not become necessary to issue any currency under this power.

In addition to this, the act gave power to the President to prevent, in emergencies, the hoarding of gold. Under this provision great quantities of gold that had been withdrawn from banks by depositors during the period of panic were ordered returned to the Treasury and currency other than gold was given in exchange.

In May of the same year Title III of the Agricultural Adjustment Act, sometimes called the Inflation Act, provided means for increasing the amount of paper money in circulation and authorized the devaluation of the gold dollar up to fifty per cent. In June the gold clauses in government and private contracts were abrogated. In October the government began the policy of buying newly mined gold at higher and higher prices. Apparently, the theory behind this scheme was that the effect would be to depreciate the currency and thus raise commodity prices. The plan was unsuccessful in this respect, although it may have had some value in stimulating foreign trade. In January, 1934, the Gold Reserve Act was passed, substituting gold certificates for gold held by Federal reserve banks, placing upon a more orderly

basis the regulations under which gold might be held by individuals, vesting title in the United States to all monetary gold in the country, and discontinuing the coinage of gold except for limited purposes. It further provided for certain contingencies in the event of devaluation of the dollar, limited the President's power of such devaluation to between forty and fifty per cent, and authorized proportionate reduction in the weight of the silver dollar and other silver coins. On January 31, 1934, the President proclaimed the reduction of the weight of the standard gold dollar.3 Devaluation constituted a tacit recognition of the failure of the gold purchase plan. Its purpose appears to have been the same as that of the earlier program, the raising of the price of commodities. Its actual effects in this respect have been doubtful. Prices eventually did rise subsequent to devaluation, but it is doubtful whether this was due to devaluation or to other factors. Along with these various measures affecting the standard dollar, a number of other measures were taken in relation to silver. In general, these measures were designed to raise the price of silver and to increase the purchases of silver by the United States government. The purposes back of the silver policy are somewhat obscure, but the program on the one side seems to have been designed as part of the price-raising policy and on the other appears to have been the result of pressure from silver interests to "do something for silver."

Deposit Insurance

An important measure relating to banks that grew out of the emergency but which may remain as a permanent part of our banking organization is deposit insurance. American banking history has not been a happy one. Losses of depositors have been appalling, as compared with the losses in other countries. During the depression of the 1920's and early 1930's there was not a cent lost by depositors in Canadian banks, while in the United States the savings of thousands of people were being wiped out by bank failures. The imaginary line that divides the United States from Canada represented a vast difference in

³ See p 640.

the safety of depositors. Deposit insurance is at least a temporary corrective for the problem of the United States.

The Federal Deposit Insurance Corporation now insures the deposits in each subscribing bank to the extent of one hundred per cent of the deposits of each depositor up to \$10,000, seventyfive per cent of the excess over \$10,000 up to \$50,000, and fifty per cent beyond that. Subscribing banks must purchase stock in the Corporation in proportion to their deposit liabilities. Banks which are members of the Federal Reserve System must become subscribers and participate in the plan. As a permanent system, deposit insurance is subject to the weakness that the sound banks must assist in carrying those that are not so carefully managed. In fact, where deposit insurance existed in certain states before the depression, the guarantee fund was exhausted by the failure of the weaker banks early in the depression before the others began to fail. In a sense, the weaker banks thus enloved an advantage. However, the federal insurance plan has been very effective in restoring confidence in our banks and thus the whole banking system has profited.

The Federal Government as a Banker

To some extent the federal government has gone into the banking business. The oldest of its activities of this nature is the Postal Savings System, which was established in 1910. It accepts deposits in limited amounts upon which it pays a low interest and operates through the post offices scattered over the country. It has been effective in encouraging savings among persons of small means and has provided a repository for the funds of poor people who were not willing to trust their savings to private banks.

In 1934, the Federal Credit Union Act provided for another type of savings institution sponsored by the federal government, known as Federal Credit Unions. A Federal Credit Union is described in the law as "a cooperative association... for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes." It will be noted that these associations are not only savings but lending agencies.

On the side of lending, numerous federal agencies have been established in recent years. Those in connection with agriculture have been discussed elsewhere. Reference also has been made to loans under the Public Works Administration.

The most important of all these lending agencies is the Reconstruction Finance Corporation, which grew to become the largest financial institution in the country. Established in 1932, its original purpose was to make loans to banks that at that time were much in need of credit. Eventually it extended its activities to cover loans to institutions other than banks. Its loans were directed primarily toward aiding banks and large national industries.

A number of agencies were created during the depression to aid in saving homes from mortgage foreclosures, in encouraging repairs upon homes, and in aiding home construction. The Federal Home Loan Bank Act of 1932 created the Federal Home Loan Bank Board for the purpose of making advances to building and loan associations, insurance companies, and savings banks, on the security of home mortgages. The Home Owners' Loan Act of 1933 created the Home Owners' Loan Corporation, under the supervision of the Federal Home Loan Bank Board, for making direct loans to home owners. This Corporation is now in process of liquidation. The National Housing Act of 1934 created the Federal Housing Administration, with authority to establish a revolving fund for mortgage insurance, to make loans to banks for the financing of repairs and improvements upon real property, and to provide for insurance of the accounts of building and loan associations. Subsequent amendments provided for the insurance of loans by banks for repairs and improvements and for expansion of the mortgage insurance features.

The United States Housing Act of 1937 set up in the Department of the Interior the United States Housing Authority to make loans and grants to public housing agencies for low rent housing projects and slum clearance projects.

Presumably most of these agencies are temporary in nature and eventually will be discontinued.

^{*}See p 715.

⁵ See p. 740.

The States and Banking

The states retain extensive powers of control over banks. However, much of the control of banks has been lost to the federal government. National banks are chartered by the federal government and thus come directly under its control. Other banks are chartered by the states. At one time state banks issued circulating notes, but this came to an end in 1865, when the federal government levied a prohibitive ten per cent tax on such notes of state banks.⁶ However, encroachments of the federal government upon state banking systems have come about more because of practical considerations than through the exercise of direct powers. In order to enjoy the benefits of membership in the Federal Reserve System, state banks must subject themselves to its regulations, and while by no means all state banks are members of the Federal Reserve System, the more important ones are. All state banks which are members of the Federal Reserve System also are part of the Federal Deposit Insurance plan and are subject to examination by the Federal Deposit Insurance Corporation.7 Other state banks may be accepted in this insurance plan and become subject to examination by the Corporation. Thus, the powers of the federal government in relation to state banks have grown through action of the state banks themselves.

For the regulation of banks the states provide either a commission or a single officer, usually appointed by the governor. In a few states election, or appointment in some other way than by the governor, is customary. Terms of commissioners are short. most serving for less than six years. Election is a poor method of choosing a bank commissioner, for the voters cannot examine into his technical qualifications. In some states the bank commissioners may refuse charters to banks, but in most states they are limited to the examination of existing banks. Our system of state banks has been the weakest link in the banking system. Unqualified persons have been permitted to engage in a business that calls for men of only the best training and the highest eth-

⁶ See p 235. ⁷ See p. 648.

ical standards. Having been admitted to the practice of a profession of such vital interest to the public, their actions often are submitted to only the most perfunctory examination by the regulatory authorities. Even national banks evidently have not been subjected to the most complete scrutiny, but state banks, and especially those outside the Federal Reserve System, appear to have been under even less rigid supervision.

Insurance

Unlike banking, the insurance business is entirely under state control. The business of insurance is not interstate commerce.8 An insurance company is subject to the regulations of the state which incorporates it, and since it is not engaged in interstate commerce, it may enter other states only upon meeting the requirements of those states. One who purchases insurance, therefore, is dependent upon the laws of the state incorporating the company with which he deals, or upon the supplementary limitations imposed by the state in which it is operating. Most states have a separate insurance commission or officer to administer their insurance laws. Insurance commissioners usually are appointed by the governor, but sometimes are elected. They have the power to grant and refuse licenses, to conduct examinations, revoke licenses in proper cases, and to take other action to carry out the insurance laws. These laws even go so far as to control the type of investment to be made by the companies. Not only does the state have greater powers of control over insurance than it has over banking but these powers have been more thoroughly exercised.

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⁸ See p 564.

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CHAPTER XXXIII

Labor

The Industrial Revolution

Before the industrial revolution such manufacturing as was carried on was in small shops where master, journeymen, and apprentices worked together in close personal relationship. The workmen were skilled craftsmen or apprentices, who performed all the operations incident to the production of the finished article. The weaver made cloth and the shoemaker made shoes. Workmen took pride in their skill

The industrial revolution brought about great changes in this system, for it introduced two new elements to industry—the division of labor and the use of power machines. One man did not perform all the operations leading to the production of the finished article. He operated a machine that put the article through one or more of the stages of manufacture. Large numbers of workmen in our own time have lost the status of the old craftsmen. They manipulate machines and their duties consist of the monotonous repetition of a single operation. They are punchers of holes, tighteners of bolts, assemblers of rods. Their work does not have the zest that comes from seeing the product grow through its various stages under their own hands, and monotony leaves them exhausted at the close of the day. They work in noise and dust and in close proximity to dangerous machines.

In the early years of the industrial revolution the factory system came into being. Many workers were assembled under one roof and since the old skilled craftsmen were not needed, women, children, and unskilled laborers were employed. Since the supply of such laborers was large, their bargaining power was poor. Their wages were low, they worked for long hours, and their sur-

roundings were unhealthful and dangerous. In time, factory laws came into existence, regulating these conditions.

Factory Laws

Since manufacture is not interstate commerce,1 the regulation of working conditions is a matter for state law. States commonly require that safeguards be afforded from moving machinery parts, that buildings be protected from fire, that sanitary facilities be afforded, and that sufficient air and light be provided. Since it is difficult to provide properly in a statute for all such details, a number of states have passed laws requiring in general terms that safe conditions must be provided. Then they have set up an industrial commission, which issues detailed regulations carrying out the law. These regulations are enforced through inspections by representatives of the commission. This type of regulation is considered by far the most satisfactory, for the commission is in a position to adjust its regulations to the needs of each industry and to constantly changing conditions. Since it is an administrative as well as a regulatory body, it can see that its regulations are obeyed.

State Maximum Hour and Minimum Wage Laws

The right of the state to place reasonable limits upon the hours of labor has been upheld as a valid exercise of the police power ² Most of the states have fixed a maximum of eight hours a day for children under sixteen, and they often prohibit night work. Most also have some restrictions upon the working hours of women, although these restrictions vary considerably and often apply only to certain types of work. Few states place limitations upon hours of labor for men. Where the hours of labor of men are regulated, the laws usually apply only to dangerous industries.

State minimum wage laws have been upheld more recently,³ and time will be needed for an extension of such laws if they are

¹ See p 563

² See p. 547

³ See p. 549

considered desirable. There is no unity of opinion as to their wisdom. If an industry can pay a reasonable wage, obviously on social grounds it may properly be required to do so. On the other hand, if any industry cannot pay a decent minimum to its employees, it is a "parasite" industry It is producing something for which there is so little demand that there is not sufficient profit. Presumably, such an industry has no good reason to exist. However, the problem is not so simple as this. Employees who have been earning something, even though a very little, may be thrown completely out of work. There may be no other industry at the time or in the neighborhood which can absorb them. Temporarily at least, the law might be followed by much suffering. Another objection to minimum wage laws is the alleged fact that in practice the minimum fixed in the law tends to become the maximum. Employees who might have been earning more may be sacrificed to bring the lower paid groups up to the common level.

Another objection that may be offered both to minimum wage laws and laws fixing maximum hours is the fact that often they apply only to certain groups, as, for instance, to women. In this case, a law intended to protect the weak from long hours may often work a hardship, since the employer may then employ a man who can work the longer hours or can accept the lower wage. Where wages and hours are the same for men and women, employers may prefer men.

In the lower wage brackets where physical strength or endurance often 1s a factor, men are likely to be preferred above women. Both types of law must take all these factors into consideration if what 1s intended as a humanitarian measure is not to develop cases of hardship.

Often labor unions have been cool toward state legislation upon these subjects. They have preferred to depend upon their own power of bargaining with employers. However, the labor unions of the past, and especially the more powerful ones, have represented the upper crust of labor. It is the lower group, who do not qualify for the craft guilds, who might expect to profit most by legislation.

The Adamson Law

Until recently, activity of the federal government in labor legislation has been limited, except in areas under its control, such as the District of Columbia. The Adamson eight-hour law was a federal act applying only to railroads and had its origin in a national emergency.⁴

Labor Conditions Under the N.R.A.

Under the National Industrial Recovery Act⁵ a great extension of federal activity into labor relations was attempted. Restrictions upon child labor and provisions for minimum wages and maximum hours were written into numerous codes. The iustification for such national action lies in the nature of our industrial organization. If an industry extends into several states and one of those states places restrictions upon it while the others do not, the industry in that state is placed at a competitive disadvantage. Since interstate compacts upon such matters are difficult to secure, that state may see its industries migrate into those that permit the exploitation of labor. Under such circumstances the situation would seem to call for national action. Again, however, the problem is not simple. Some differentials would appear to be necessary to take care of sectional differences in wage levels and production costs, and the determination of differentials that will bring about a proper balance involves many difficulties.

The Fair Labor Standards Act of 1938

The Fair Labor Standards Act of 1938 was enacted by Congress in an effort to provide minimum standards for the country as a whole. It fixes a minimum wage of twenty-five cents an hour for the first year after the act goes into effect, thirty cents an hour for the succeeding six years, and forty cents thereafter, unless a rate of between thirty and forty cents is fixed by the Administrator of the Wage and Hour Division which is set up in the Department of Labor. The Administrator is also empowered

^{*}See p 595.

⁵ See p 620.

⁶ See p. 297.

to convene an industry committee for each industry which may recommend for that industry an earlier application of the minimum wage than is required by the act, and this recommendation becomes effective with approval of the Administrator.

The act also fixes a maximum work week of forty-four hours for the first year after the act goes into effect, forty-two hours the second year, and forty hours thereafter, except that employers may require longer hours with one and one-half the normal pay for overtime. Exceptions to this rate are permitted when a different maximum is determined upon as a result of collective bargaining as certified by the National Labor Relations Board, and provided certain standards of maximum hours and overtime pay referred to in the act are met.

With the exception of certain industries and types of employees mentioned in the act, its provisions apply to all industries engaged in commerce or in the production of goods for commerce. There is little question that this act is unconstitutional under previous decisions of the Supreme Court, which adhere to the doctrine that manufacture is not interstate commerce and hence is a matter for state regulation. Apparently the act was passed under the belief that the Supreme Court, with a somewhat altered personnel, might reverse its previous position.

The act prohibits the interstate shipment of goods produced in violation of its terms and provides penalties for violations.

Child Labor Laws

Attempts on the part of the federal government to limit the use of child labor in the states so far have been unsuccessful in the courts. Efforts to accomplish regulation under the commerce power and under the taxing power have been held unconstitutional in both instances, as was the attempt under the N.R.A. A Constitutional amendment designed to grant such power to Congress has failed to secure the necessary number of state ratifications. Meantime, the Fair Labor Standards Act of 1938, in addition to its wages and hours provisions, prohibits the interstate shipment of goods from any establishment in which within thirty days "any oppressive child labor" has been employed.

⁷ See pp 230, 564.

Children employed in agriculture while not legally required to attend school and child actors are exempted. The child labor provisions of the act are administered by the Chief of the Children's Bureau in the Department of Labor. Like the other provisions of the Fair Labor Standards Act of 1938, this seems to be in conflict with previous decisions of the Supreme Court upon the powers of Congress.

Workmen's Compensation

Systems for providing relief for workmen injured in the course of their employment and for their families have been much improved in the last quarter of a century. Formerly, an injured workman could sue in the courts, but the common law defenses of the employers were so well developed that it was difficult to secure a judgment. The doctrine of the assumption of risk, the doctrine of contributory negligence, and the fellow-servant rule were so broad that injured workmen were at a distinct disadvantage in the courts. In any case, litigation was slow and expensive and employees with small means could not easily cope with employers who were not in need of an early decision and who could afford expensive counsel.

Nearly every state now has set up a workmen's compensation system which provides prompt relief in cases of injury and death by an administrative process and without need for court action unless a case is appealed. These laws do not usually apply to all industries or to all types of accident. Agriculture and domestic service usually are excluded. There is a tendency to include occupational diseases under the heading of accidents. The amounts allowed for each accident are determined according to principles set forth in the law, usually being related to the nature of the injury and the normal wages of the employee. Lump-sum or weekly payments are allowed for under different circumstances. A board is set up which administers the law. Compensation is automatic in all cases coming under the law, so that the old question of whether compensation is due is eliminated. Employers may be required to insure in a state-controlled insurance fund or may be permitted an alternative of in-

suring in a private company or of self-insurance through establishing financial responsibility. Other states rely only on private companies or self-insurance. Most of the laws are not compulsory, but the freedom of an employer or an employee to elect to remain inside the act may be somewhat illusory, for if the employer so elects, he is often deprived of his common law defenses, while if the employee so elects, the employer is granted these defenses.

These laws have done much to reduce suffering among workmen and their families, for loss of income through the death of the wage earner or through disability is one of the most frequent causes of distress among the poor.

State Laws Upon Industrial Disputes

Industrial disputes, such as strikes and lockouts, involve such large numbers of people and engender such virulent feeling that legislation toward their settlement is difficult to enforce. Some tentative legislation upon the subject exists, but no state now has a law compelling compulsory arbitration. A Kansas law of a compulsory nature as applied to the food, clothing, and fuel industries was held unconstitutional in 1925 (Wolff Packing Co. v. Court of Industrial Relations).8 Colorado requires that a period elapse before a strike goes into effect so that a public investigation may be made into the issues. Most of the laws on this subject merely set up boards of conciliation which attempt to bring about an amicable settlement between the parties to labor disputes. They may arbitrate disputes and bring about a binding settlement only when both parties accept in advance the jurisdiction of the board. In addition to this, a number of states have restricted the use of court injunctions and restraining orders in labor disputes. Union leaders had complained bitterly of the wide use that some courts had made of such orders which interfered with the activities of strikers. Since cases of contempt of court arising from violations of injunctions commonly are tried without a jury, the general use of injunctions may have an arbitrary appearance. Changes in the law governing procedure in

^{*} See p. 550.

such cases have attempted to restrict the use of these orders so as to provide adequate protection to society without interfering unduly with the activities of strikers.

Raılway Labor Disputes

The jurisdiction of the federal government in labor disputes in most part follows its commerce powers. In the exercise of these powers the federal government once interfered in an emergency in a dispute between the railroads and their employees in order to avert a national strike. At the present time the National Mediation Board has for its purpose the prevention of railway strikes, and the National Railroad Adjustment Board serves the same end in a narrower field by arbitrating differences concerning the interpretation of agreements between railroads and their employees. 10

The United States Conciliation Service

In the settlement of disputes in industries other than transportation the federal government has less claim to jurisdiction Since 1913 the Secretary of Labor has had authority to appoint commissioners of conciliation in labor disputes, and under this authority the United States Conciliation Service has been set up This agency, however, lacks the stability and independence of a permanent board. The conciliation commissioners act for the Secretary of Labor in disputes to which he may assign them, and since the Secretary of Labor is looked upon as the representative of the employees rather than an impartial officer, his representatives may be regarded with suspicion by employers. Their opinions have no binding force, for their only function is conciliation, that is, to attempt to bring the parties to a dispute to an amicable agreement.

The N.R.A and Labor Disputes

Under the National Industrial Recovery Act of June 16, 1933, a great extension of federal power in respect to labor disputes

⁹ See p. 595 ¹⁰ See p. 598

was attempted. Section 7 (a) of this act required that every code of fair competition must include provisions recognizing the right of employees to organize and bargain collectively through representatives of their own choosing and prohibiting employers from requiring employees to join company unions or to refrain from joining unions of their own choosing. Labor boards were authorized by a resolution of June 19, 1934, to aid in carrying out these provisions, and certain boards were appointed. However, section 7 (a) went out with the rest of the code structure.¹¹

The National Labor Relations Act

With the collapse of the code plan of the National Industrial Recovery Act, Congress was not willing to see the end of the principles of Section 7 (a). A National Labor Relations Act was promptly passed on July 5, 1935. This act recognizes the right of employees to organize and bargain collectively, makes it an unfair labor practice for an employer to interfere with this right, and prohibits interference by employers with labor organizations. Other provisions in effect prohibit company unions and permit closed shop agreements between employers and unions under which only union men may be employed. An important section provides that representatives of a majority of the "employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit" for bargaining purposes, except that individuals or other groups may present grievances to employers. The act sets up a National Labor Relations Board which may designate the proper unit, whether employer unit, craft unit, plant unit, or subdivision thereof, and determine what group constitutes a majority within the unit by secret ballot or other "suitable method." The board also may prevent any person from engaging in any of the unfair labor practices referred to, issue a complaint, provide a hearing, and issue an order to cease and desist from the unfair practice, and may reinstate employees dismissed in violation of the act. The board may petition Circuit Courts of Appeals for the enforcement of its decisions. The findings of the board, "if supported by evi-

¹¹ See p. 624.

dence," are made conclusive Appeals by persons aggrieved by an order of the board go to the Circuit Courts of Appeals. The board may compel witnesses to testify. This act constitutes a refinement of the provisions of the National Industrial Recovery Act upon the same subject. The National Labor Relations Board is not, a board of conciliation or arbitration. It has no dealings with employers except by way of enforcing the prohibitions upon unfair labor practices. It has two classes of functions: first, that of determining what unit shall be the basis of labor organization and what group constitutes the majority within each unit, and second, that of enforcing the prohibitions of the law upon employers.

Immediately after coming into existence the National Labor Relations Board was confronted with a split in the ranks of union labor. The American Federation of Labor for years had represented the organized workers of the country. It was organized primarily on a craft basis, carpenters being in one union, bricklayers in another, and so on, so that each industry was divided horizontally by craft unions which themselves were organized in the American Federation of Labor. Under the leadership of John L. Lewis, a large group of working men, some of them from within the old Federation, began organizing on an industrial rather than a craft basis, each industry being organized as a unit, thus bringing about a perpendicular division of industry. Decisions of the National Labor Relations Board brought it into the strife between these warring factions within labor itself. In addition, it came under criticism from the employers on the ground that they were being ignored by the board. In defense of the board, however, it should be noted that the act was so framed as to bring it into relations with the employers only in proceedings against them in enforcing the regulatory provisions of the act.

The constitutionality of this act was much in doubt, since its sweeping provisions included firms, such as manufacturing plants, previously considered as engaged in purely intrastate processes. However, the Supreme Court upheld the act in its applicability to concerns which brought from other states the major part of their raw materials and which shipped the major part of their

products across state lines. The reasoning of the court was that the labor disturbances which the act was designed to prevent would constitute direct obstructions upon interstate commerce.¹²

Federal Regulation of Injunctions

While the commerce clause is the basis of most of the federal powers in relation to labor, it is not the only source which has been drawn upon. The power of Congress to regulate the jurisdiction and procedure of the courts has been used to restrict the use of injunctions by the courts. The Clayton Act of 1914¹³ attempted to define the circumstances in which the injunction might be used in labor disputes and prohibited its use to prevent strikes, peaceful picketing, boycotts, and certain other practices of unions. The accused was granted the right to jury trial in cases of violation of injunctions in such labor disputes, unless committed in the presence or immediate neighborhood of the court.

The use of injunctions was further regulated in the Norris-La-Guardia Anti-Injunction Act of 1932, which declared it to be the public policy of the United States to recognize the weakness of individual employees against employers and the need to organize and engage in "concerted activities" for mutual aid. It outlawed "vellow dog" contracts, by which employees or prospective employees agreed not to join or remain members of unions, or to resign from employment if they did, by making such contracts unenforceable in the federal courts. The act listed further specific labor practices which were excepted from restraint by injunction, fixed a procedure, including public hearings, in ordinary injunction cases, required bond from the complainant to cover losses to those injured by temporary restraining orders issued under extraordinary circumstances, and prohibited injunctions where the complainant had refused to make "every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." The act further restricted the arbitrary action of judges in contempt cases where the contempt arose from an attack upon the judge involved, by permitting the defendant to

¹² See p 569.

¹³ See p. 609.

demand another judge, unless the contempt was committed in the presence of the court. This restriction was intended to limit individual judges in the imposition of arbitrary sentences for contempt of court, allegedly imposed in defense of the dignity of the court, where the offense is an attack upon the character or conduct of the judge. The restriction is considered particularly necessary, since sentences for contempt of court are normally made without jury trial. A sentence by the judge involved in such cases appears to have the nature of a trial by one of the parties to the dispute.

A significant feature of the Norris-LaGuardia Act lies in its recognition of the interest of the public in a dispute between employer and employee. The employer who refuses to recognize that interest by failure to negotiate with the workers or to make use of governmental machinery provided in such cases is denied the protection of the courts in so far as injunctions are concerned. The act gives to all business and industry something of a public nature and departs from the concept of a business as the exclusive property of the owner to be conducted as he likes. His relations with employees are invested somewhat with a public interest.

An unusual feature is that this federal act seems to include the use of state governmental machinery for the settlement of labor disputes as a prerequisite to resort to the federal courts for an injunction.

Federal Contractors

In its relations with its own employees the federal government has not recognized their right to strike or to bargain collectively, although the organization of employees and affiliation with the American Federation of Labor is not prohibited. Considerable control of labor conditions other than among its employees is exercised through restrictions upon government contractors. Under the original grants of the National Industrial Recovery Act of 1933, which created the Federal Emergency Administration of Public Works, all contracts contained a provision by which disputes upon wage rates were to be settled by a Board of Labor

Review. Since 1892, contractors on public works of the United States have been required to maintain an eight-hour day for laborers and mechanics.

The Walsh-Healey Act of 1936 has carried this principle to the point of providing virtually a labor code for government contractors. It provides that contractors producing materials in any amount exceeding \$10,000 must agree that all employees engaged in the production of the materials shall be paid "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work" or in the same or similar industries in the locality; that employees be limited to eight hours a day and forty hours a week; that males under sixteen and females under eighteen shall not be employed; and that working conditions must not be insanitary or dangerous. Compliance with state law, however, is made prima facie evidence of compliance with the provision upon working conditions. It is difficult at this time to determine what the ultimate effect of this act will be. On the one hand, it may tend to raise labor standards generally. On the other hand, it is possible that industrial concerns which do not depend largely upon government contracts, and which have lower labor standards than those set forth in the act, will withdraw from competition for such contracts. This again may tend to concentrate government contracts in the hands of companies that will limit their work primarily to government contracts. Reduction in the amount of competition presumably might raise prices paid by the government. In this event the benefits of the act to labor will be limited.

Disputes in the Coal Fields

One further activity of the federal government should be mentioned. In the great coal strike of 1902, with the whole country suffering from the effects of a stoppage of production, President Theodore Roosevelt threatened to intervene with the power of the federal government if something were not done to settle the dispute. He may have had no Constitutional authority to do this, but he did have at his disposal the army of the United States and he had the support of public opinion. The coal oper-

ators then showed a disposition to make concessions and the strike came to an end.

The attempt of Congress to regulate labor conditions in the bituminous coal fields in the Bituminous Coal Conservation Act of 1935 was held unconstitutional in the Supreme Court, but the act of 1937 guarantees to workers in this industry the right to organize and bargain collectively.¹⁴

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¹⁴ See p. 696.

CHAPTER XXXIV

Social Security

Factors in Poverty

There are many causes of poverty. Accident or disease which incapacitates the head of the house often leaves a whole family in distress. Insanity, epilepsy, feeble-mindedness, blindness, loss of limb, and the like may make it impossible for the victim to compete for a livelihood. Infants and old people may be left without means of support. Liquor and dope addicts are likely to dissipate their funds and destroy their own ambitions and capacities, so that eventually they are dependent upon charity. Then there are the shiftless and the lazy, who have no pride in accomplishment and no energy for action. They may become public charges. Another group, chronically poor, are the victims of poor management, and to this class should be added those who have been unfortunate in their choice of investments. The total number of persons in these groups is not subject to great fluctuations.

In addition, our industrial society has produced another group, varying greatly in numbers, who offer an acute problem in relief during periods of industrial inactivity. These are men and women, entirely able and willing to work, who are employed when business is active but who are dropped from the payrolls during slack times. Their incomes do not allow sufficient surplus to carry them into the next period of employment and they become dependent against their own wills.

Private Relief

Sometimes the care of these unfortunate people, whether they are permanent indigents or are the victims of industrial malad-

justment, is undertaken by their own families. In a society in which family solidarity is sufficiently strong there is no need for public relief. The family cares for its own members. Travelers in Japan are impressed by the fact that they find no beggars on the streets, for here family solidarity is so strong that even the poorest does not think of denying to an unfortunate member of his family a share of the little that he possesses. Moreover, in the East the family is a unit that includes relatives of remote degrees, so that the family pool is well spread. In Western countries family ties are taken less seriously and society is more individualistic. As a result, a greater share of the burden of relief is carried by the community, although even here an enormous burden of aid is carried by immediate and even remote relatives.

A large amount of relief also is provided in the form of private charity. Churches and fraternal organizations give aid to their members, provide orphanages and homes for the aged, build hospitals, and establish summer camps for children. Even political machines do work of this kind. Tammany in New York City has spent very considerable sums in charity, although, unfortunately, the charitable work of a political organization may not proceed entirely from the love of humanity. An effort to systematize the collection of funds for some of these activities in each city is represented in the Community Chest movement.

The Growth of State Charity

In addition to all of this, a great deal of charitable work is carried on by government agencies, and the tendency is toward the extension of government charities. In our early history this fell entirely upon the local authorities. It is still true that the basic unit of public charity is the county in most parts of the country, the town in New England, and the township in a few states. The burden upon these units has been relieved somewhat by the charitable work of cities, however, and the state governments have been gradually taking over various forms of assistance, until at the present time the sums spent by the states are greater than those of the local governments.

State charity has taken the form of aid to various classes of indigents. Insane asylums, homes for the blind, and orphan

asylums are common forms of state institutions. In some states, children are placed in private homes, since institutional life is not considered best for their development. State homes for soldiers and sailors and for their widows and orphans have relieved the localities of a considerable burden in many states. Thus, a large part of institutional aid to special classes has been assumed by the states. It leaves to the localities the residue of permanent indigents.

Local Relief

Local relief in the United States has been inadequate, wasteful, pervaded with graft, and ignorantly administered. The administration of our local almshouses has been a disgrace equalled only by that of our local pails. One reason for inefficiency is the small number of persons in each institution, a large percentage having less than a dozen inmates. Thus, there are too few people in each institution to permit provisions for proper conditions without making the cost disproportionately high. For this reason it has been proposed to do away with all local poorhouses and poor farms and place the inmates in large state institutions under the care of skilled workers and nurses. Some states permit counties to unite in the maintenance of almshouses, and in others one county may enter into a contract with another to provide for its indigents. Both of these plans help in bringing about better conditions, but they are not so satisfactory as a state-maintained institution would be.

Most local institutions are under the management of local officials. In some instances, however, the private contract system is used. Where the poorhouse is leased to a contractor, the worst evils develop, since there is every incentive for the contractor to operate at a profit to the detriment of his charges.

All local relief is not limited to institutions. In some states "outdoor relief" is given, the recipients remaining at home and receiving funds for maintenance. Some counties place children in private homes rather than subject them to institutional life.

The poor-relief work of the county usually is under the control of the county board, but independently elected overseers of the poor or superintendents of the poor are found in some states.

In some instances poor-relief officials are appointed by the courts.

State Supervision

In most states there are state authorities who have some measure of supervision over local poor-relief bodies. This includes inspection and the requirement of reports from the county or town, and may even involve power to make changes, to approve plans for new buildings, or even to issue regulations.

Most states have set up a department of public welfare under a single head, or a board of public welfare, which exercises control over the state institutions and carries on the welfare work of the state. The coordination produced by unified responsibility for the charitable activities of the state is a hopeful sign. It may presage a greater measure of control over all public welfare work, including that of the counties.

Mothers' Pensions

Some progress has been made in the newer methods for the relief of poverty. Mothers' pensions are a special type of aid that avoids the difficulties of institutional life. Mothers who have no other means of supporting fatherless children may receive an amount, depending upon their need, that will keep the family intact and render institutional aid unnecessary. These pensions are permissible in most states, but they have not actually been provided for in all localities. Much remains to be done before mothers' pensions become an actuality everywhere. In some instances the laws provide that the state shall bear part of the expense, and in others they leave the whole burden of the pension upon the county.

Early Old-Age Pensions

Old-age insurance was experimented with abroad earlier than in the United States. However, even before the passage of the federal Social Security Act a number of states had enacted laws on this subject. Public old-age "pensions" differ from the ordinary type of pensions in that the recipients must prove their need for the aid. Residence within the state for a fixed period, long

enough to prevent the migration of indigents from other states, is required

In modern industry it is difficult for persons of advanced age to secure or to maintain employment. Competition is so fierce that an employer who retained persons unable to keep up the pace would find himself at a disadvantage. Minimum wage requirements, insisted upon by the workers themselves, prevent the payment of lower wages as efficiency declines. The use of machines has reduced the need for persons who have the type of skill that is developed slowly and reaches fruition in the mature years. In some industries a man is old at fifty and is likely to be transferred to a watchman's position or similar work, provided he is retained at all. Minimum wage requirements designed to improve the condition of the workingman, have helped to create unemployment among people of advanced age. They make oldage pensions an even greater necessity than before.

English Poor-Law Experience

Modern industrial organization produces a special problem in the relief of distress during periods of business depression. In England, which has had a long history in poor relief, we find a good example of the complication of the older relief problems with the acute distress of a severe depression.

The first English poor law was passed in 1552. It was one of the products of the reform movement of that period. This law used the parish as the unit for relief and required that each parish should care for its own poor. In 1601 an act of Elizabeth codified existing laws on the subject and continued the parish system of relief. The plan was successful for a short period but soon broke down as an effective means of relief for the poor.

In 1796, Parliament assumed the obligation of granting aid to the poor in the form of "outdoor relief," that is, payments to persons not being cared for in institutions. Unfortunately, employers merely took advantage of this act by reducing wages to the point that supplemental governmental relief was necessary to provide a living. The number of paupers grew rapidly and the drain upon the treasury caused by what was, in effect, a subsidy to employers reached appalling proportions.

In 1834 a new system was instituted in the Poor Law Amendment Act This act abolished outdoor relief except in a very limited number of cases. Persons who were unwilling to enter the workhouse were assumed to be able to take care of themselves. Thus, a quite efficacious test of poverty was set up at the outset. The single parish was abandoned as the unit of local relief and parishes were grouped into poor-law unions, which became the new units for local relief. The boundaries of these unions did not coincide with those of the other units of local government, but divided the country into entirely independent units. A poor rate or tax was levied in these poor-law unions, each of which was under the supervision of a board of guardians, locally controlled. In each parish there was an elected overseer of the poor who acted as rate collector. The poor rate was so convenient a means of tax assessment that it became customary to use it as the basis for assessing other local taxes, the local governing bodies simply adding to the poor-rate assessment any additional tax they might desire to lay.

However, the local poor authorities were by no means made independent in the administration of the unions. Central authorities, in time constituted as the Local Government Board, later succeeded by the Ministry of Health, exercised over them a very close supervision. It issued regulations that minutely controlled the administration of the unions and had power to audit the expenditures of the board of guardians. Thus, on its administrative side, poor relief was closely supervised by the central authorities.

This system, by abolishing outdoor relief for able-bodied persons, minimized the danger that relief would create pauperism. By providing a central control it secured honest and efficient administration over a long period. At the same time, locally elected officers levied the rates, spent the funds, and administered the relief. This plan was intended for the relief of permanent dependents. Unfortunately, the depression beginning in 1920 led to a breakdown in the whole system, which was not planned to meet the pressure that results from industrial dislocation. The depression strained especially the resources of the unions in the neighborhood of industrial centers. The restrictions in the act

that denied outdoor relief to able-bodied persons except under exceptional circumstances were openly disregarded. The need for aid for large numbers of such persons was too evident. In time, the central government even began to make loans to the local authorities; this money was used to carry the added burden. In 1925 some changes were made in the system and some of the functions of the overseers of the poor were transferred to the town and district councils. This law was a prelude to the breakup of the whole system of poor-law unions.

In 1929 a Local Government Act transferred the functions of the old poor-law authorities to the councils of the counties and county boroughs. Thus, the poor law areas came to correspond with the other governmental areas, and the regular local governmental authorities took over their administration. However, the Minister of Health may combine any two or more counties or county boroughs for the purpose of administering the poor laws. The act also regularizes the grants of the central government to the local authorities for purposes of poor relief. The supervision of the Minister of Health remains unimpaired.

Unemployment Insurance

The poor-law unions were planned to care for the permanent indigents of each community. An independent plan, initiated by the Act of 1911, is designed to care for the victims of industrial depressions, giving relief to able-bodied men who are willing to work but are unable to secure employment.

The Act of 1911 provided for a fund into which the employer and employee contributed in equal proportions and the central government contributed one third of the total contributed by the other two. Benefits were limited to persons able and willing to work but unable to secure jobs, and they must have worked at least twenty-six weeks in the preceding five years. The number of weeks for receiving benefits were proportioned to the time during which they had contributed to the fund, but were limited to a maximum of fifteen weeks a year. The amounts of benefits per week was kept so low as to be below the subsistence level. It was intended merely to supplement savings during the period

of unemployment. Moreover, no benefits were granted for the first week of unemployment, known as the "waiting period." The act applied to only a small number of trades.

Development ınto a "Dole"

The Act of '1911 has been subjected to many amendments, which have extended its provisions to nearly all employments, with the exception of agriculture and domestic service. Certain persons are excluded because of age or because their salaries are above a fixed amount. The tendency has been to increase the contribution and the benefits. Men now make larger contributions than women and receive higher benefits. The number of weeks for the receiving of benefits has been made more flexi-For a while the "waiting period" was reduced to three days, thus greatly increasing the costs, since the number of lay-offs for such a short period greatly exceeds the number for long periods The system originally was designed to meet the exigencies of normal business fluctuations but not to meet the pressure of a great depression, and the changes have been largely the result of the need to meet this strain. The original act provided for a true industrial insurance plan, with benefits not to go beyond the total in the fund. The amendments have departed from this principle, in practical effect setting up a poor relief system in the form of a "dole" which has been grafted upon the original scheme.

Early Depressions in the United States

The depression that began in England in 1920 did not strike the United States until 1928. The United States had no system of unemployment insurance. Periods of depression had occurred with regularity in the past, but there had been an abundance of cheap land to which many of the victims could go for a new beginning. Soup lines in the cities had taken the edge from some of the most acute distress, and sometimes "public works" had been advocated as a means of providing employment on useful projects during periods of depression; they were to be paid for during periods of prosperity.

The Wisconsin Plan

As the American depression progressed, the British experiment was studied with increasing interest, but up to 1935 only one state, Wisconsin, had provided a system of unemployment insurance. The Wisconsin act that set up this system, was passed in 1932 and was known as the Unemployment Reserves and Compensation Act. Subsequently it has been amended in some important respects, although the fundamental plan has not been changed. The law applies to all employers of a fixed minimum number of persons (at present, six persons), and includes the state, municipal corporations, and other political subdivisions. Farm laborers, domestic servants, public officers and salaried public employees, interstate railway employees, and certain other groups are excluded from the act. Each employer subject to the act is required to pay into the unemployment reserve fund, in which his contributions are kept in a separate account, a percentage of his annual payroll (the present standard rate being 2.7 per cent of the payroll). Whenever his account becomes low, his contribution is increased, and whenever his account is deemed sufficient by the state commission, it may be decreased. A small percentage contribution also is made to a fund to pay expenses of administration. Employees become eligible to benefits after a waiting period of a fixed number of weeks of unemployment (at present, three weeks). Benefits are based on the average weekly wage of the employee, but with a fixed maximum (at present \$15 a week, or half the weekly wage, whichever is lower). However, the employer's account for each employee is not liable to benefits for any employee after a fixed period of payment (at present, twenty-six weeks). Provision is also made for payments in case of partial unemployment. A further limitation upon benefits lies in the fact that they may be received by an employee only in an amount proportional to his employment during the past year (at present approximating one fourth of the wages of the employee for that year). Other provisions prevent the payment of benefits to employees discharged for misconduct and attempt to limit benefits to those who are actually the victims of unemployment.

The Social Security Act

The year 1935 marked the entry of the federal government into the field of old-age insurance and unemployment compensation. The Social Security Act not only made provision for these reforms but included provisions for federal aid to the states in other forms of social legislation.

The act provides for seven different forms of federal appropriations. Two of these set up plans for unemployment compensation and old-age pensions. The other five are simple grants-in-aid to the state.

Unemployment Compensation

The unemployment compensation feature of the act levies a uniform tax for the whole country but leaves each state comparatively free to work out its own plan of compensation, provided this is approved by the Social Security Board.

All states participating in the federal grants are required to pay into the Federal Unemployment Trust Fund, in which there is a separate account for each state, all the money received by the state for the purposes of its unemployment insurance plan. The plan is under the administration of the Social Security Board. The act provides for the annual appropriation of the sum of \$49,000,000, which the Board is to distribute among the states in accordance with population, an estimate of the number of persons covered by the state law, the cost of proper administration, and "such other factors as the Board finds relevant."

The tax to meet the expenses of this plan is called an excise tax. It is levied on employers of eight or more persons. The tax is based on total wages and salaries during each year, and begins at one per cent in 1936, rises to two per cent in 1937, and remains at three per cent thereafter. However, contributions paid by an individual into an approved state unemployment fund may be credited against this tax up to ninety per cent of the total. Thus, it is expected that ninety per cent of the total will go into state unemployment compensation funds.

Under certain conditions of favorable employment experience or where a guaranteed employment fund or a special reserve account is provided by an employer under a state law, additional credit may be permitted. Such state funds, however, are to be placed in the Federal Unemployment Trust Fund.

The purpose of a tax that is uniform over the country while permitting each state to administer most of the fund, is to assure equality of taxation on business in each state while leaving to each state an opportunity to formulate a plan of compensation that is suited to its own peculiar needs. The effect of the federal law is to compel states to set up unemployment insurance plans on pain of having the whole federal tax, without credits, applied to their citizens, who at the same time would receive none of the benefits. The federal tax does not apply to agricultural labor, domestic service in a private home, service on a vessel on the navigable waters of the United States, service in the employ of a son, daughter, or spouse, or by a child under twenty-one in the employ of his father or mother, service in the employ of the United States or a state, or service with a charitable, religious, or educational organization not conducted for profit.

The act provides that no participating state shall deny unemployment compensation to any individual for refusing to accept new work if the position is vacant directly because of a strike, lockout, or other labor dispute, if the wages, hours, or other conditions of work are substantially less favorable than those prevailing for similar work in the locality, or if as a condition to being employed the individual would be required to join a company union or resign from or refrain from joining a labor organization.

The act does not state that the taxes are to be used for the purpose of unemployment compensation. The taxes and the compensation feature appear in different parts of the act and the effort is made to keep them independent. The framers no doubt had in mind the fact that a federal appropriation for any purpose is likely to be upheld in the courts, and that a simple tax not related to the unemployment feature would be valid. There was danger, however, that the courts would hold the whole scheme invalid if the tax was laid specifically to secure funds for unemployment compensation. As a matter of fact, in the case of

Steward Machine Co. v. Davis, involving the unemployment compensation feature of the act, the majority of the Supreme Court upheld the plan, not only taking the position that the taxing and spending features were independent of one another but holding that even if they were related, a plan to relieve the problem of unemployment was within the province of the federal government. The Court also took the position that the plan for unemployment compensation did not amount to coercion upon the states. This decision was limited to the unemployment compensation feature of the act.

In June, 1938, a separate system of unemployment insurance, federally administered, was set up for interstate railroads, express companies, and sleeping-car companies.¹

Old-Age Pensions

The system of old-age benefits in the Social Security Act provides for pensions to persons who have reached a fixed age. It is not charity, as in the case of old-age assistance, for it is not based upon need, and is not a mere grant, except in form. It is planned as insurance, and at least a part of the premiums are paid by the beneficiaries.

The plan applies to all employments except agricultural labor, domestic service in a private home, casual labor, service on United States or foreign vessels, federal or state services, and educational, religious, and charitable organizations not conducted for profit. No benefits will be paid until the year 1942. Eligible persons who are sixty-five years of age or older will then begin to receive benefits. These benefits will be at the monthly rate of one half of one per cent of the total wages paid to the individual between December 31, 1936, and the time he reaches sixty-five, provided these wages do not exceed \$3,000 altogether. Additional benefits at the rate of one twelfth of one per cent a month will be paid on amounts between \$3,000 and \$45,000, and one twenty-fourth of one per cent on amounts above \$45,000. However, the total monthly benefit may not in any case exceed \$85. While the individual remains regularly em-

¹ See p. 598.

ployed, he may not receive benefits. In the event of the death of an individual before attaining age sixty-five, there is provision for payment to his estate of three and one-half per cent of his total wages (not counting any above \$3,000 a year) subsequent to December 31, 1936. In the event of the death of an individual after age sixty-five, his estate is to receive the difference between benefits already paid and three and one-half per cent of the total wages (not counting any above \$3,000 a year) received after December 31, 1936, and before attaining age sixty-five, if the latter amount is higher.

Two kinds of "taxes" are to be levied to pay these old-age benefits. The first is called an income tax on employees and the second is called an excise tax on employers. Both taxes are based upon employees' incomes in the form of wages or salaries, but neither tax is applied to that part of any renumeration which exceeds \$3,000 in any year. The employees' tax begins in 1937 at one per cent, rises in 1940 to one and one-half per cent, rises again in 1943 to two per cent, rises in 1946 to two and one-half per cent, and finally in 1949 reaches three per cent. It is to be collected from the employee by the employer and by him paid in to the federal Treasury.

The employers' excise tax is equal in amount to the income tax paid by the employee.

The act provides for the issuance of stamps which are to be used in paying these taxes.

Neither the employees' income tax nor the employers' excise tax applies to any of the employments previously mentioned as excepted from the plan or to wages of persons above the age of sixty-five.

As in the case of unemployment compensation, the tax for this phase of the act is kept separate from the other features. No doubt an important consideration here, too, was to enhance the chances of its being held Constitutional. In Helvering v. Davis the old-age benefits plan was upheld on the ground that the expenditure for old-age benefits was for the general welfare, and that the tax was valid, ignoring the question of their relationship.

At the same time, the framers of the act may have had another purpose in mind when they kept separate the appropria-

tion and tax features of the law. If the levies were in the form of premiums which were paid into a fund set aside for the purpose of benefits, there would be a legal claim on the funds on the part of the beneficiaries. As the act stands, their contributions are in the form of taxes from which they have no claim to benefits, and the benefits are in the form of grants which may be made or withheld at the will of the federal government. The funds derived from these taxes may be spent for any purpose Congress desires. However, there is not much likelihood that benefits will ever be withheld, even though the funds accumulated by the tax are used for other purposes and the benefits provided for from other taxes from year to year.

Old-Age Assistance

The system of grants-in-aid in the Social Security Act do not constitute the same departure from precedent as do the unemployment compensation and old-age benefits features.

One of these plans for grants-in-aid provides a system of oldage assistance. This is entirely distinct from the old-age pensions or benefits Old-age assistance is a form of charity and is a substitute for the poorhouse. It is granted in the form of money to dependent aged people who are thus permitted to live at home. The federal law authorizes the appropriation of sums of money annually from the Treasury sufficient to pay half the total of the amounts spent by each state for old-age assistance, and in addition authorizes the appropriation of five per cent of the total of such amounts to be used by the state in administering the plan or for supplementing the old-age assistance fund itself. However, where the total amount of assistance to an individual exceeds \$30 a month, the excess is not to be counted in determining the amount of federal aid. To receive the federal aid a state must make its old-age assistance plan effective in all its subdivisions. The minimum age limit temporarily may be as high as seventy, but after 1940 the state may not fix an age requirement of over sixty-five. Other provisions assure federal approval of the state administrative plan and require reports to the federal authorities.

Aid to Dependent Children

Another title of the act provides for federal appropriations to the states in connection with aid to dependent children. The federal share of such aid is to be one third of the total. In determining this amount, however, any aid beyond \$18 a month for one child in a home, plus \$12 for each additional child, is not to be counted. The aid goes to children under the age of sixteen who have been deprived of parental support by reason of the death, continued absence from home, or physical or mental incapacity of a parent. The child must be living in the home of one of certain specified near relatives. Federal approval of the state plan of administration is required, and there are other provisions which are designed to secure the proper carrying out of the law.

And to the Bland

Another title of the act authorizes appropriations to be made to the states for aid to the blind to the extent of half the total sum paid in such aid, plus five per cent to be used by the state in administration or in aid. In determining the total sum spent, not over \$30 a month for each individual is to be counted. Restrictions similar to those in connection with aid to dependent children are set forth.

Maternal and Child Health Service

The act authorizes the appropriation of \$3,800,000 a year in aid of maternal and child health service, \$2,850,000 in services for crippled children, and \$1,500,000 for child-welfare service. The sums are to be expended in aid of state services for these purposes. The part of the act appropriating these sums is to be administered by the Children's Bureau. Additional sums are authorized for the vocational rehabilitation of injured persons. The Office of Education had administered the provisions of the old Vocational Rehabilitation Act and the additional sums authorized in the Social Security Act are to be administered by the same authority.

Public Health Work

Eight million dollars a year is authorized for aid to the states in the carying out of public health work. The allotment of this fund is made by the Surgeon General of the Public Health Service with the approval of the Secretary of the Treasury, upon the basis of population, special health problems, and the financial needs of each state. An additional two million dollars a year is authorized for expenditure by the Public Health Service in connection with the investigation of disease and problems of sanitation, and other expenses incurred in connection with its work of cooperation with the states.

Administration

All of the grants-in-aid set forth, except those to be administered by the Children's Bureau, the vocational rehabilitation funds, and those administered by the Surgeon General of the Public Health Service, as explained above, are to be administered by the Social Security Board, consisting of three members appointed by the President with the advice and consent of the Senate for staggered terms of six years.

Need for State Action

The provisions of the Social Security Act are in part dependent upon action to be taken in the states. The old-age benefit system, however, is not dependent upon any state action. Both the tax features and the benefits are to be carried out without reference to state lines and without need of state cooperation or even of state consent.

The District of Columbia Model

Old-age assistance is dependent upon state cooperation. Since Congress immediately enacted legislation in the District of Columbia that was intended as a guide to the states in carrying out their plans of cooperation, it would be well to examine the system of old-age benefits set up by Congress for the District. This law applies to aged persons who are in need and whose disabili-

ties seem to make their need of assistance permanent. The minimum age is fixed at sixty-five. Inmates of insane asylums and correctional institutions, habitual tramps and beggars are ineligible, as are also those who have a child or other person financially able and legally responsible to furnish support. However, where the kin can supply only partial support, supplementary assistance may be given under the law. The act is administered by the Commissioners of the District The amount of assistance for each individual is left to their discretion. However, since the federal contribution is limited to half of a monthly total of \$30, this is not likely to be exceeded. Applicants may be referred at the discretion of the Commissioners to the Board of Public Welfare for admission to the Home for Aged and Infirm, but no inmate of the Home may also receive old-age assistance Upon the death of a recipient or of the survivor of a married couple, the total amount of assistance that has been granted, together with simple interest at three per cent, is deducted from the estate of the deceased. Half of such sums collected from estates is transferred to the federal government, in accordance with a requirement of the federal Social Security law.

A similar act provides aid for the needy blind. It is administered by the Commissioners and no definite amount of aid is fixed, except for a maximum of \$30 a month for a blind dependent child living with its parents. No person may receive assistance under this act at the same time that he is receiving old-age assistance.

In providing for District cooperation in the national unemployment compensation plan, a tax is laid upon employers of one or more individuals. Employments excepted from the District act have been made to correspond approximately with the employments excepted from the federal law. The District tax was fixed at one per cent for 1936, two per cent for 1937, and three per cent for 1938, 1939, and 1940. From 1941 on, the employers will be divided into classes, each of which will pay from one and one-half to four per cent, depending upon the unemployment hazard in each class. As an employer, the District's share was fixed at \$100,000 for 1936, \$125,000 for 1937, and \$175,000 for 1938. It is evident that the District has not followed the Wis-

consin plan of a separate account for each employer, but has adopted that of a single pool, with the modification that after 1941 the individual contributions will bear some relation to the unemployment hazard with each employer, thus encouraging employers in the maintenance of good records for steady employment. Benefits began under this act in the year 1938.

To receive benefits, an unemployed individual must have performed employment in at least thirteen weeks within the past year. In addition, he must have registered for work at a designated employment office and must accept work offered to him, provided he is fitted for such work and provided it meets certain other requirements. A waiting period of three weeks of total unemployment or six weeks of partial unemployment is required.

Benefits for the totally unemployed are to be at the weekly rate of forty per cent of the average weekly wage of the beneficiary, plus ten per cent for a dependent spouse and five per cent for each dependent relative. However, the total must not exceed \$15 a week or sixty-five per cent of the average weekly wage, whichever is less. Partially unemployed persons may receive benefits sufficient to bring their total weekly income to \$2 more than the benefits would have been if totally unemployed.

A further limitation upon benefits restricts the total amount to be received in any period of a year. This is based upon the "credit week," that is, a week in which the individual has performed some employment against which no benefits have been charged and with respect to which no benefits were paid. Total benefits within any period of a year are payable in the ratio of one third of a week's benefit to each credit week which occurred within the last two years, until a total of sixteen times a week's benefit have been paid; after which, benefits are payable in the ratio of one twentieth of a week's benefit to each credit week which occurred within the last five years.

Congress, in this act, gave permission to the District authorities to enter into agreements with State authorities for an exchange of rights acquired by individuals in one jurisdiction who transfer to the other.

The act is administered by a board of five, consisting of the three Commissioners of the District and one representative of employees and one of employers appointed by the Commissioners.

Summary

All these forms of social legislation aim directly at the relief of human suffering. However, in so far as they involve taxation in times of general prosperity to provide funds for relief in times of depression, a second purpose is served, for the tax presumably will tend to act as a brake upon expansion during a boom while the payments should reduce stagnation during the slack periods between. Thus the extremes of the industrial and business cycles should be reduced and business made to proceed from year to year at a more uniform rate of activity. Social security should thus be enhanced through the more stable conditions of industry and trade.

On the other hand, it should be noted that the federal Social Security Act was enacted without the long period of public discussion that usually precedes the adoption of such basic legislation. It is almost certain that the law will need to be amended in important respects. If it had been adopted in less haste the social security plan might have assumed a quite different form.

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CHAPTER XXXV

Conservation

The Meaning of the Term "Conservation"

The conservation movement in the United States is of comparatively recent origin. It is associated with the name of President Theodore Roosevelt, who, in his dramatic fashion, drew attention to the rapid depletion of our natural resources, particularly of our timber supply, and focused the attention of the country upon the activities of special interests that were profiting from the exploitation of resources of vital importance to the nation.

The conservation movement is directed primarily toward the conserving of supplies that cannot be renewed. These resources should not be regarded as the possession of a single generation to be destroyed in wanton waste but should be drawn upon with regard to the future while caring for the needs of the present. When our present supplies of easily obtainable oil are gone, another generation will be able to secure its supply of oil only by expensive processes or must find substitutes. Decades are needed to produce a timbered area, and when our existing forests have been cut, the maintenance of a supply sufficient for current needs will be most difficult.

While the term "conservation" applies strictly only to the protection of our natural resources from waste, it has come to be used in a much broader sense. It now covers measures to protect the public from excessive charges and inadequate service by companies which have been granted the privilege of using these resources. The best example of this is in connection with water power. Since the right to develop water power is a public possession, inordinate profits by companies that have been given franchises for its development constitute a public loss. More-

over, poor service and high rates tend to prevent extensive use of such resources.

More recently the term "conservation" has been used to cover measures designed to protect the private owners of natural resources from the low prices and unfair practices that result from excessive competition, and to protect the employees of these owners from low wages and unsatisfactory working conditions. Thus we had the Bituminous Coal Conservation Act of 1935, which in fact was directed toward these ends rather than toward the mere protection of the national coal supply. Probably this somewhat loose use of the term comes from a desire to associate such measures with the popular conservation movement and to suggest a justification for them, but it is also a convenient means of grouping together all those measures that relate to the preservation or use of national resources.

The Forests

Historically, the conservation movement is particularly associated with timber preservation. The original settlers had found the forest their worst enemy. To prepare patches of ground for tillage, the heavy timber growth must be removed and this involved the most arduous labor. The earliest patches of corn were grown in rich virgin soil between the bare skeletons of trees that had been "girdled" and killed, but eventually it was necessary to remove the dead timber and take out the stumps before anything other than surface cultivation could take place. The process of removing the timber continued steadily and by the opening of the present century men who looked ahead became alarmed at the rapidity with which the supply was being depleted. Moreover, since forested areas retain rainfall and drain less rapidly than cleared fields, the destruction of large areas of timber tends to increase the danger from floods to farms and towns along rivers which cannot carry off the sudden rush of water from rains or melting snow.

Our western plains were bare of trees when crossed by the first white men. Deficiency of moisture sufficient for growth

¹ See p 697.

and, in some areas, the character of the soil, no doubt, were the chief factors in preventing the growth of timber. While proposals have been made for the planting of belts of trees in these regions as windbreaks for soil conservation purposes and some efforts have been made in this direction, the plains country can be ruled out almost completely as a source of future timber cultivation. It becomes doubly necessary that care be exercised in the use of timber in the East, South, and far West.

Most of the states have forestry boards operating under a variety of names, sometimes as a division in a conservation department. To a very considerable extent this work is "educational," calling attention to the danger of fires, giving instruction in the preservation of forests, inducing farmers to plant trees in unused fields, and giving instructions in respect to appropriate plantings. Since it is desired that farmers extend their wooded areas, some states sell seedlings at a low price or even give them away for planting.

One of the chief causes of forest waste is fire. Forest fires sometimes are started by lightning, but too often they are the result of the carelessness of man. Repeated admonitions to the public and instruction in the schools, calling attention to the proper precautions for preventing fires, no doubt have had an effect, but campers continue to leave their fires unattended and smokers continue to toss lighted cigarettes into brush heaps. There results another activity of the forestry boards, which is the putting out of fires after they have started. For detecting the first signs of fires, lookout towers are erected and foresters are sent out to prevent the spread of conflagrations.

Some states have state forests which are maintained as recreation grounds or as hunting and fishing reserves. Demonstrations of the proper methods for the care and utilization of woodlands are carried out. In some states worn-out farms have been purchased and planted to trees. A considerable number of American towns maintain town forests. In Germany, municipal forests have been maintained for years, the timber being cropped like other agricultural products and turned into a profitable municipal enterprise.

The conservation movement has had a distinctly federal as-

pect. It was Theodore Roosevelt who publicized it in the beginning, particularly through his conference of governors in 1908. Roosevelt himself, under Congressional authorization, removed vast areas from unrestricted exploitation.

There are two federal bureaus primarily concerned with the forest resources of the United States. The Forest Service of the Department of Agriculture has jurisdiction over the national forests. Most of these forests are in the western states and consist of areas of the national domain that have not been turned over to the states. Since 1911, national forests, mostly in the Appalachians and acquired by purchase, have been taken over in the eastern states. The national forests cover in the aggregate a vast area comprising about eight per cent of the land of the United States, excluding insular possessions. The timber in these forests is of tremendous value, and over a quarter of the potential water power of the country is within their borders. The original purpose in setting up the national forests was to conserve the timber resources primarily, but protection of the water supply is also an important objective. As will be seen later,2 water-power development is now under the jurisdiction of the Federal Power Commission. The Forest Service is largely concerned with protecting the timber from fires, controlling the marketing of trees, and safeguarding the streams and lakes. In areas suited for grazing, it controls the leasing to stock men. In addition, it supervises the use of the forests for recreational purposes, a function that has grown with the use of the automobile. The visitors to the parks now are numbered in the millions yearly. Mining entries in the national forests are, controlled by the General Land Office.

The Forest Service has some functions not connected with the national forests, such as affording protection to private forests and furnishing information upon the planting of trees, the harvesting of the crop, and the utilization of the timber. All of these activities come under the general heading of conservation.

The second bureau primarily concerned with forest conservation is the National Park Service in the Department of the Interior. It has jurisdiction over national parks, similar areas

² See p 705.

known as "national monuments," and certain minor federal properties. National parks and national monuments, under the jurisdiction of this bureau, are distinguished from the national forests of the Forest Service by the fact that they are not open to commercial development. Timber may not be cut for lumber, grazing permits may not be issued, water power, except in certain special areas, may not be developed, and mining rights, with a few exceptions, may not be granted either in the national parks or in the national monuments.

The federal government, through appropriations, has assisted the states in providing fire protection, and in educational work, and aids in the distribution of seedlings. The federal activities center in the Forest Service. The principle of requiring that the states match the federal appropriations has been followed in respect to funds granted the states for these purposes. In 1933, as an aid to unemployment, the Civilian Conservation Corps was set up. It consisted primarily of young men who were out of work. They were placed in camps scattered over the country which were maintained on a semimilitary basis. The C.C.C. has built forest roads, cleared out areas of brush with a view to fire protection, and even assisted farmers in clearing lands and in taking measures to control erosion.

Wild Life

In some states the forestry department enforces the fish and game laws, but in others this is left to separate agencies. Closed seasons for the killing of certain types of game, limits upon the bag for any one person, and the requirement of licenses to hunt and fish are various means of protecting the diminishing wild life of the country. Game refuges are being laid out by some states, and in some there are state forests which are maintained as fish and game preserves.

The federal government cooperates with the states in the protection of fish and game, and is becoming more and more a factor in the protection and development of our wild life. Two federal agencies, the Bureau of Biological Survey in the Department of Agriculture and the Bureau of Fisheries in the Department of

Commerce, are especially important in these activities. At the same time, there are other bureaus, established primarily for other purposes, which have the conservation of wild life as a secondary or incidental function.

The Bureau of Fisheries maintains fish hatcheries for the restocking of lakes and streams. Some of these are within the national parks and national forests, but are managed by the Bureau of Fisheries. Cooperative arrangements have been made with other agencies having jurisdiction over national lands, such as the Civilian Conservation Corps, the Tennessee Valley Authority, the Agricultural Adjustment Administration, the Bureau of Biological Survey, and the Bureau of Reclamation, for the supply of fish, the management of hatcheries, and the protection of streams. The Bureau does not maintain salmon hatcheries in Alaska, but the federal government lends assistance to that industry by paying the private hatcheries forty cents a thousand for red salmon and king salmon fry released there.

Certain fish, such as salmon, at a certain period of their development return from the sea and work their way up the streams of their origin to spawn and die. Actuated by this primordial impulse they show extraordinary power and persistence, swimming up swift currents and even making their way over falls of considerable height. However, dams along the streams may block their way entirely, thus perhaps destroying an entire industry by breaking the life cycle of the fish upon which it is built. In cooperation with the Army Engineer Corps and other agencies concerned with the building of dams, the Bureau of Fisheries constructs "ladders" which permit these fish to make their way by stages over the dams. Other devices proposed or in use for the protection of the fish are "fish locks" for raising fish over dams, passes to permit small fish to swim downstream, and devices for maintaining the water above dams at a more constant level, thus reducing the danger from pools in which fish are landlocked at low water.

The Bureau of Fisheries also carries on scientific studies upon the life cycles of various kinds of fish and upon their food, habits, and environment. The pollution of streams is a chief cause of the destruction of aquatic life, and the Bureau of Fisheries investigates the effects of various forms of pollution, including that from industrial waste. These studies furnish the basis for protective measures. The Rivers and Harbors Act of 1899, relating to the discharge of refuse in navigable waters, and the Oil Pollution Act of 1924 offer some protection to our rivers from certain forms of pollution. Such studies are supplemented by similar investigations of the Public Health Service, particularly with reference to the effect of sewage pollution upon oyster beds and to methods of treating sewage and other waste.

A number of state conservation departments, particularly in seacoast states, carry on scientific studies of aquatic life, and these frequently cooperate with the federal Bureau of Fisheries in their projects. There is a close cooperation between state and federal hatcheries, with the exchange of eggs and small fish, the joint use of hatcheries, and so forth.

There are a number of instances of cooperation between the United States and foreign countries upon matters affecting the fishing and sealing industries. The North American Council on Fishery Investigation is composed of representatives from the United States, Canada, and Newfoundland. It exchanges information upon the fishing industry and compiles statistics upon the quantity of fish taken in various localities. The International Fisheries Commission, representing this country and Canada, regulates the halibut fishing of nationals of the two countries in the waters around Alaska and the western part of Canada, determining the limits of the closed season, restricting the catch, and exercising other broad powers. Its regulations must be approved by the President of the United States and the Governor-General of Canada. The United States enforces its phase of the regulations under the Northern Pacific Halibut Act of 1937 and maintains patrol vessels to carry out its provisions.

Probably the most interesting of these international cooperative arrangements relates to the fur seals of the North Pacific. These animals return each year from their wanderings to their breeding grounds, chiefly on the Pribilof Islands off the Alaskan coast. Under an agreement between the United States, Great Britain, Russia, and Japan, pelagic killing of these seals, which was depleting the herds, has been prohibited, except that natives may under

certain restrictions kill at sea. All other killing takes place on the islands, is carried out by representatives of the Bureau of Fisheries, and is so restricted as to protect the herd from depletion.

The federal bureau most concerned with wild life on land is the Bureau of Biological Survey. It constitutes a central clearinghouse for all information concerning land animals and birds, and carries on investigations concerning their habits and foods, their diseases and enemies, and their relationship, beneficial or otherwise, to man. This bureau maintains wild-life refuges in various parts of the country and cooperates with other agencies which have refuges of their own. In Alaska it functions through a special organization, the Alaska Game Commission. Bird and waterfowl refuges serve as resting places for birds migrating between North and South, and as breeding grounds for native birds. Such refuges and game preserves give the young opportunity to grow unmolested and constitute feeding grounds for the adult animals.

However, the Bureau of Biological Survey is by no means the only federal agency concerned with the protection of wild life. In the national parks, under the jurisdiction of the National Park Service, all hunting is prohibited, and while in the national forests, under the jurisdiction of the Forest Service, hunting is not entirely prohibited, nevertheless the Service cooperates with the states in the enforcement therein of the state game laws. Not only is hunting prohibited in the national parks, but the park rangers provide food for the larger animals in severe winters, and special game preserves are maintained within their limits by the Bureau of Biological Survey, where special attention is given by that bureau to the development of wild life. Game refuges have been set up by several other federal agencies, including the Bureau of Reclamation, the War Department, the Navy Department, and the Department of the Interior. Other agencies cooperate with the Bureau of Biological Survey in various forms of endeavor in protecting wild life in areas under their jurisdiction.

A few illustrations will show that the protection of wild life has so many ramifications that it cannot be limited solely to one department. When the Forest Service plants new trees, it is providing shelter for young animals, preventing erosion that might lead to the pollution of streams inhabited by fish which can live only in clear water, and decreasing the danger from floods which will sweep away the food upon which the fish live. Similarly, the Soil Conservation Service also is becoming an important factor in wild-life conservation. Activities of other bureaus may have far-reaching indirect effects upon animal life. For this reason, one of the most important functions of the Bureau of Biological Survey lies in its cooperation with other agencies by way of furnishing technical information and in supplying expert assistance.

Coöperation between federal officials and state conservation departments appears in many forms. An important present joint campaign is being carried on by federal and state authorities in the destruction of rodents and predatory animals. The federal Lacey Act prohibits the interstate transportation of game birds and animals killed in violation of state laws, and the black-bass law similarly protects this variety of fish.

Despite all the activities of federal authorities, however, the states remain the most important factor in the protection of all wild life except those larger animals that are now found only in the federal reserves. It was the theory of English law that the king owned all the wild animals and in this country the states have succeeded to this ownership. Thus, a state may require of non-residents a larger fee for a hunting license than of residents, since the wild life of the state is the common property of the people of that state. Migratory birds may, however, come under the jurisdiction of the federal government when they are the subject of a treaty with a foreign country. Under the migratory bird act, carrying out the provisions of a treaty with Great Britain, birds which migrate between the United States and Canada are protected from indiscriminate killing.

Petroleum

The need for public intervention in the protection of a natural resource will depend largely upon the limits of the supply, the

⁸ See p 303.

^{*} See p 152

rate at which it is being depleted, and the value of the resource to the public.

It is particularly in connection with those resources that are contained in the earth in a fluid state that state action is most needed, and the courts have been most liberal in permitting public interference with private property rights in such resources. A New York law prohibiting the artificial extraction from the rock of natural carbonic acid gas water which comes to the surface at Saratoga Springs is an example (Lindsley v. Natural Carbonic Gas Co.). A law of Wyoming prohibiting the wasteful use of natural gas is another example (Walls v. Midland Carbon Co.).

Petroleum has become one of the most important of our national resources. One of its products, gasoline, is an essential in connection with automobile transportation at the present stage of development. For years there have been predictions of the approaching exhaustion of the supply, but discoveries of new fields have successively extended the period, and no doubt there will be further developments in our ability to utilize sources now known but not commercially suited for exploitation in competition with the richer fields. However, it is desirable to conserve as long as possible the pools of easily available oil. Unfortunately, resources such as oil are subject to a special temptation to overproduction. Since oil rests in large fields in a fluid state, a producer who taps the pool draws oil not only from under his own land but from under the lands of his neighbors. Even though an adjoining owner desired to protect his own oil from exploitation, he could not do so. Thus, every owner of land in the field is constrained to rush into production in a race with his neighbors, and the pool is rapidly exhausted. Even though all the oil is used, the method is wasteful in that it does not bring about the most economical distribution over a period of time. Incidentally, the producers themselves may lose profits, for retention of the oil after it has been drawn from the well is not practicable, the market is oversupplied, and prices decline.

Under these circumstances the state of Oklahoma set up a commission which "prorated" the production in each area so as to keep down the total amount produced and to give to each producer a proportion of the total, and although the United States Supreme Court held certain features of the act to be invalid, it upheld the general principal of proration where the method of arriving at the proportions was reasonable.5

However, when section "o C" of the National Industrial Recovery Act of 1933 authorized the President to prohibit the interstate transportation of petroleum and its products in excess of amounts permitted by state law, the Supreme Court, in the "hot oil" case, held that the act did not lay down sufficient criteria for Presidential action and constituted an unconstitutional delegation of legislative power (Panama Refining Co. v. Ryan). This decision turned upon a special provision of the National Industrial Recovery Act and did not involve the "petroleum code" which had been drawn up under that act. However, eventually the whole code structure fell in the subsequent general collapse of the N.R.A. after the decision in the Schechter case.6

The Connally Act of 1935 subsequently prohibited the interstate shipment of oil in excess of amounts permitted by state laws or regulations. This act was to expire June 16, 1937, but has been extended to June 30, 1939. Under it the Petroleum Conservation Division of the Department of the Interior was set up to administer its provisions and to investigate and report upon problems of conservation of oil and gas.

There has been some effort at cooperation among oil-producing states in the conservation of petroleum. In 1935, an agreement, which was to expire September 1, 1937, but which was later extended to September 1, 1939, among six states, providing for concerted action particularly in relation to the prevention of physical waste, was approved by Congress.

Coal

Regulation of the production of minerals such as coal and iron is more difficult to justify than is the regulation of petroleum production, since these minerals lack the element of a fluid condition where one producer draws from under the lands of other owners. Moreover, since we have many areas in which there

⁵ See p 554. ⁶ See p. 624.

are outcroppings of coal at the surface, extraction by small producers is easy and policing in the enforcement of restrictive measures is difficult.

The bituminous or soft coal industry is an outstanding example of a "sick industry." Low wages and unsatisfactory working conditions for the employees and low profits for the owners have been the rule. Strikes have threatened to the up production and thus cripple the industry of the country. Violence in connection with labor disputes has been frequent.

Under the National Industrial Recovery Act, a code of fair competition for the bituminous coal industry was adopted On the side of labor it fixed a maximum of forty hours a week for workers, with not over eight hours a day; provided for minimum rates of pay; safeguarded the right of laborers to organize and bargain collectively; protected laborers from being required to rent their houses from the employer or to trade at a company store; prohibited the employment of children under seventeen inside the mines or in hazardous employment outside unless the state law provided otherwise; and prohibited any employment of children under sixteen. The owners were guaranteed a fair market price for coal, to be fixed by agencies of the code authorities. Divisional code authorities, consisting of representatives of the operators sitting with one nonvoting representative of the public, were set up in each of the geographical divisions of the industry, and a National Bituminous Coal Industrial Board, dominated by representatives of the operators, was provided for. Labor disputes were to be settled by divisional labor boards, consisting of one member chosen by the President, one chosen by him from a list nominated by the employees, and one chosen by him from a list nominated by the operators. A National Bituminous Coal Labor Board was to have jurisdiction over disputes involving more than one division or the general public. This code, however, fell with the rest of the N.R.A.7

Subsequently, Congress enacted the Bituminous Coal Conservation Act of 1935. This act set up a National Bituminous Coal Commission, which was to formulate a bituminous coal code, covering substantially the same ground as the old N.R.A. code,

⁷ See p. 624

with provisions fixing a minimum price for coal, maximum hours of labor, stabilization of wages, collective bargaining, and the like. The act did not in express terms make the provisions of the code compulsory upon all soft-coal operators. It did, however, provide for an "excise tax" of fifteen per cent of the sale price of coal at the mine, of which "tax" 90 per cent was to be refunded in the case of any operator who accepted and lived up to the code. The Supreme Court held this "tax" to be in reality a penalty upon operators who refused to accept the code. The labor provisions of the act were held unconstitutional and the price-fixing provisions were considered inseparable from the labor provisions. Thus, the whole regulatory structure of the act fell (Carter v. Carter Coal Co).

This decision left open the question of the power of Congress to provide for price fixing in the bituminous coal industry. Taking advantage of this opening, a new act was passed in 1937, establishing in the Department of the Interior a National Bituminous Coal Commission, consisting of seven members, appointed by the President with the advice and consent of the Senate for a term of four years. It was given authority to draw up a new code and to set minimum and maximum prices in districts which were to be erected. The act defined and prohibited certain unfair methods of competition and guaranteed to workers the right to organize and bargain collectively in organizations of their own. A tax of one cent per ton was placed on sales by the producer. In addition, another "excise tax" of nineteen and a half per cent of the sale price or fair market value was provided for, but code members were exempted from this tax. By eliminating most of the regulatory provisions affecting labor, the act clearly attempted to save such parts of the former law as had not been definitely considered unconstitutional by the majority of the Supreme Court in the opinion upon that law. Evidently it was assumed that if price fixing was permissible, the nature of the "excise tax" as a penalty would not be unconstitutional.

There are many persons who question the wholesale regulation of national industry such as was attempted under the N.R.A. who nevertheless believe that within this "sick" bituminous coal industry reasonable efforts toward stabilization are much needed,

especially as it involves the exploitation of one of our most important national resources.

Some mention should be made here of the efforts to reduce the number of fatalities in mines and to improve the efficiency of mining processes which have been made by the Bureau of Mines in the Department of the Interior. The technical research of this bureau covers other types of mine as well as coal, however. In addition, the Geological Survey, in the same department, carries on investigations to determine the occurrence of minerals, including coal.

Water Resources

There is one form of conservation in which the states can make little headway. The development of our rivers and harbors must almost necessarily be interstate in character, both from the point of view of navigation and from that of protecting river cities from floods. River improvements and storage reservoirs constructed along the upper reaches of rivers are interstate in their effects and have to be regarded as properly within the domain of the federal government. The same principle applies to water-power development. Since the federal government has jurisdiction over the important streams, the private or public use of water power developed from them is subject to its control.

The waters of the United States have been one of the oldest subjects of national attention. The dredging of rivers and harbors has been regarded as a proper function of the national government both because of its military value and because of its relationship to interstate commerce. River and harbor development in the past was regarded as one of the chief contributors to "pork barrel" legislation, by which members of Congress strengthened themselves in their districts by securing appropriations for navigation projects. To what extent these appropriations went for useless projects cannot be determined, but it is not unlikely that there has been considerable exaggeration upon this phase. No such projects are entered upon until surveys have been made by army engineers and Congressional committee hearings have been held. No doubt political considerations have played a large part in the choice of projects and this has meant the direction of

funds into projects less needed than others, but actual waste of funds upon useless projects probably has been unusual.

In recent years large projects, such as the Tennessee Valley plan have overshadowed in importance the older type of small individual project. Moreover lump-sum appropriations controlled by the executive tend to replace the single Congressional authorization. Members of Congress must approach the executive for expenditures in their districts. Whether in fact funds are now being spent more profitably or with less of an eye to political effect is highly questionable.

Most of the work in connection with river and harbor improvement, except in the valleys of the Tennessee and the R10 Grande, has been performed by the Corps of Engineers of the War Department. Probably in the beginning this was due to the fact that the Corps of Engineers was the only body of available engineers able to do the work. The Corps still executes a large part of our water projects. Army officers, however, perform only the supervisory work. In each of the forty-seven districts into which the country is divided, there is a district engineer in charge of the work. He is a member of the Corps, but most of the offices below that of district engineer are filled by civilians. Since army officers do not remain on one assignment over four years, there is probably some loss in continuity as the superiors in the districts are shifted. On the other hand, the work done under the direction of the Corps has been of high quality, and the morale of the service is such that it has been preserved from construction scandals.

Before 1879 the flood-control work along the Mississippi had been limited to levees constructed by local bodies, although the federal government had engaged in improvements in aid of navigation. However, these improvements were mostly of a minor nature, such as the removal of obstructions in the channels. General deepening of channels was not attempted. The Mississippi steamers of this period accommodated themselves to a four-foot channel. Larger improvements began only toward the opening of the present century, after the day of the famous river steamers had passed and competition with the railroads brought a demand for Congressional assistance. A nine-foot channel is

now maintained on the Ohio and a similar depth is being created on the Tennessee. In 1879 the Mississippi River Commission was established. Until 1928 this body supervised construction of projects, but now it merely acts as an advisory body, while the Corps of Engineers actually carries on the construction work.

In addition to its construction work, the Corps of Engineers also makes surveys of our water resources and gives technical advice to other governmental agencies engaged in water projects. In the Tennessee Valley, for instance, the Corps proposed two plans for the development of navigation, one of which was the basis of the plan actually carried out by the Tennessee Valley Authority. The first of the government dams built in the Valley was constructed under the supervision of the Corps and it has given advice upon subsequent projects carried out by the Authority. Moreover, all permits for power developments on navigable streams must first be approved by the Secretary of War, who relies upon the Corps of Engineers for technical recommendations.

The activities of the Bureau of Reclamation in the Department of the Interior have been directed primarily toward the creation of facilities for irrigation in the arid regions of the West, although electrical power is produced incidentally at many of the dams erected by it This bureau carries out its projects through a revolving fund created originally from the sale of public lands, oil leases, and mineral royalties, and added to by the sale of water power and water rights. The law contemplates a perpetual revolving fund, the income from each project eventually paying the cost of construction and going back into the revolving fund for use on other projects. However, water users have found it difficult or impossible to meet their payments, with the result that part of the amounts due has been canceled and the original terms of payment have been revised in behalf of the farmers. Boulder Dam was constructed by the Bureau of Reclamation from a special fund, the Colorado River Dam Fund. Emergency agencies of the administration of President Franklin D. Roosevelt have provided funds to carry out other projects which are intended to be self-liquidating, as in the case of those carried out under the revolving fund. Many of these projects might have been reached eventually under the revolving fund and the effect of these allotments has been to bring about the work at an earlier date.

The Bureau of Reclamation also has cooperated with other agencies such as the Tennessee Valley Authority and the International Boundary Commission in planning or actually carrying out projects under the jurisdiction of these agencies.

Since the Rio Grande is an international river, projects upon it are of interest both to the United States and to Mexico. The International Boundary Commission, representing the two countries, has jurisdiction over surveys to determine the international boundary after shifts have occurred in the course of the river, over projects designed to retain the river in a permanent channel, and projects for the control of the water supply. A dam for irrigation purposes has been constructed and flood control and other projects have been carried out.

The most recent form of water development has been in connection with electric power. However, most power projects are related to other ends than the mere generation of electricity. For instance, the series of dams along the Tennessee River and its tributaries began with the Wilson Dam at Muscle Shoals, authorized in 1916, which was designed to produce nitrogen for war purposes. After the close of the World War there were plans for its use in producing nitrogen for agricultural purposes. At present the whole Tennessee Valley project has for its immediate ends the improvement of navigation, flood control, and electric-power production.

Incidental to flood control a program of reforestation and erosion prevention has been inaugurated. Moreover, since the Tennessee Valley Act contemplates the general improvement of the economic and social well-being of the people of the area, the Authority may go a degree farther from its primary objectives and take such measures in aid of agriculture as a program in connection with the use of submarginal land. Incidental to the production of electric power it is planned to develop a "yard-stick" by which the reasonableness of the rates of private power companies may be measured. At the same time, other steps have been taken to ease the financial burden of the people of that area in making use of electric power.

While some of the ends of the Tennessee Valley Authority have not in the past been regarded as coming within the purview of the federal government, the improvement of navigation and flood control have long been regarded as proper subjects of national action. Flood control would not be undertaken by private companies, for it is not in its nature subject to commercialization, and large projects of flood control cannot easily be undertaken by states, since such projects usually extend over state lines. Prevention of floods at the source by the preservation of forests, by the planting of crops that will hold moisture, and by the controlling of tiny streams, has come to be regarded as a national problem. These measures are particularly within the province of the Department of Agriculture. Since the economical use of dams and flood control reservoirs calls for power development in conjunction therewith, the production of electricity may be regarded as incidental.

The question of the constitutionality of federal power production was raised in the case of Ashwander v. Tennessee Valley Authority in connection with a contract which involved the sale of power generated at the Wilson Dam, referred to above. The Supreme Court held that the construction of this dam and power plant was valid as an exercise of the war power and as an improvement of navigation under the power to control interstate commerce. The dam and power plant having been established under valid Constitutional powers, the government need not allow surplus energy developed beyond its needs for these purposes to go to waste but might dispose of it by sale. Moreover, the court held that in constructing the dam and plant the government need not limit itself to a size necessary to war and navigation purposes, letting the excess potential power go to waste, but might proceed with a construction adequate to utilize all the power available. However, the Court was careful to point out that its decision was limited to the problems raised at the Wilson Dam. It did not go into the question of the status of other dams in the system or of the validity of the act creating the Tennessee Valley Authority.

The plans for the Tennessee Valley involve construction of ten dams, in addition to one already constructed by a private com-

pany It will provide 650 miles of nine-foot channel for purposes of navigation, in addition to serving the ends of flood control and power generation.

Proposals for other projects similar to that in the Tennessee Valley are now under consideration. Objections to the "socialistic" nature of such projects have been raised. The objections as applied to water-power projects are not considered so valid as they would be against, for instance, a federal manufacturing enterprise. A number of great dams built with federal funds have established precedents, and power projects usually have other objectives than the generation of power, such as flood control, which are accepted as proper subjects of governmental action. One objection often raised to governmental enterprises is the increase they bring in the number of public employees. This objection is not so applicable to power projects as to most enterprises, since their operation involves the use of comparatively few employees, especially when the power is sold wholesale to private companies. It is the maintenance of service to the consumers that calls for the greatest number of employees

Serious questions have been raised as to possible applications of the "yardstick" principle. Private plants must make allowances for taxes, interest, and depreciation, and beyond this they must make a reasonable profit to cover their risk. A federal project does not pay taxes, although it may voluntarily pay a sum in lieu of taxes, and there is danger that its accounting may be juggled so as to make a good showing in other respects. To furnish a proper "yardstick," it must make due allowance for those factors in which it enjoys advantages not possessed by private companies, for private persons cannot be expected to invest their money with the certainty of loss. If a private company could automatically write off the cost of its dam and call it "flood control," it could easily lower its rates. There must be adequate allowance made for these and other advantages enjoyed by public projects, and an independent accounting is necessary to prevent juggling of books. Some approach to this is made in the present law, which authorizes the Federal Power Commission to prescribe an accounting system for the Tennessee Valley Authority.

Another danger in such projects lies in the fact that, backed by all the resources of the United States Treasury, the federal authorities may threaten to lay out lines parallel to those of private companies if these companies do not agree to sell out at an excessively low valuation.

On the other hand, there has been a general public belief that the private power companies have been charging unnecessarily high rates. The complicated system of holding companies that had grown up tended to create confusion in the matter of valuation, upon which the public regulation of rates is based. The losses experienced by investors in the depression period through the crash of these holding companies led to a belief that the whole power situation was permeated with sinister influences. It might well be that a "yardstick" would be helpful to the public as well as to the private companies, provided the "yardstick" is an honest one, making due allowances for the advantages possessed by public enterprises.

Power companies are public utilities subject to public regulation, and their rates and practices may be controlled by the state public utility commissions.

However, the federal government is the major factor in the power situation today. Power companies tend to spread out beyond the limits of a single state and so to enter interstate commerce. Moreover, where their generating plants are located along navigable streams they are subject to licensing and control by federal authorities. A great many of the water power sites are within federal parks and reservations and thus are further subject to federal control. The federal interest has so expanded that a number of agencies relating to power have been set up, some for purposes of control and some to aid in development.

The most important of the regulatory agencies with respect to power is the Federal Power Commission. The origins of the Commission indicate the manner in which the federal government became involved in the subject of power. The War Department, concerned with the improvement of navigation, had been given incidental authority over power projects on navigable waters. The Department of the Interior, with jurisdiction over public lands, had authority to grant rights of way to electric

companies. The Department of Agriculture, with jurisdiction over forest reserves, exercised similar powers. In 1920 the Federal Water Power Act constituted the Secretaries of these three departments as a Federal Power Commission so that a uniform policy might be developed, and in 1930 this ex-officio body was replaced by five commissioners, appointed for five-year terms by the President with the advice and consent of the Senate. In 1935 the Federal Water Power Act was amended in the Public Utility Act.

The important powers of the Federal Power Commission fall under three heads—the licensing power, the control of rates and services, and the control of financial structures.

The licensing power applies to applications by public or private bodies for the privilege of establishing power projects. The jurisdiction of the Commission in this respect applies to proposed projects on streams and bodies of water over which Congress has commerce jurisdiction, and in public lands and reservations, except national parks and national monuments. Holders of such licenses must make annual payments, which are fixed by the Commission to pay for the cost of administering the act and the use of public lands and federal dams. Furthermore, if the Commission finds that excessive rates are being charged by the licensee, it may increase this amount so as to absorb the excess profits of the company.

The control of rates and services is somewhat limited. Obviously, companies which do not generate power under a federal license and which are not engaged in interstate transmission do not come under federal jurisdiction. The Commission can secure jurisdiction only when the company operates under a federal power license or when it is engaged in interstate transmission. For companies operating under such a license but not engaged in interstate transmission, the Commission has direct regulatory power over rates and services only when there is no state regulatory commission. Since practically all states have such commissions, the power of the federal commission in this respect is not very important. However, under the power of the Commission to require that the licensee add its excess profits to the annual charges, it possesses an indirect but nevertheless ef-

fective regulatory power. If a company, whether a licensee or not, is engaged in interstate transmission, the regulatory power of the Commission, as determined by the act, applies to rates upon, and services for, electricity sold wholesale. It does not apply to retail rates and services for such lines.

The Power Commission also has jurisdiction to approve or disapprove the issuance of securities by "operating" interstate companies wherever such securities are not regulated by a state commission. If the company is not an operating company, that is, if the company is not an independent unity, but is a holding company or a subsidiary of a holding company, its security issues are subject to the approval of the Securities and Exchange Commission. The latter commission is further empowered by the law to simplify the corporate structures of holding companies, which had become highly complicated, rising in a series of tiers and interrelationships, so that it was difficult for investors to determine what they were buying when purchasing stock or what security lay back of bond issues offered for sale. The act does not prohibit holding companies but does contemplate a simplification of the structures of such systems.⁸

In June, 1938, the jurisdiction of the Power Commission was extended to cover companies engaged in the interstate transportation of natural gas. The Commission was given power to determine just and reasonable rates and practices and was authorized to order improvements and extensions of services or to forbid extensions of services.

The Federal Power Commission is not the only federal agency concerned with the regulation of power projects, for the War, Interior, and Agricultural Departments still retain jurisdiction over the projects authorized by them before the enactment of the Federal Water Power Act of 1920.

The federal government has not confined its activities in relation to electrical power to the construction of dams and the licensing and regulation of private companies. It has made, through the Federal Emergency Administration of Public Works and the Rural Electrification Administration, loans both to public agencies and to private companies for the construction of power

⁸ See p 630.

projects. The Electric Home and Farm Authority has made loans to individuals for the purchase of electrical equipment and equipment used in connection with electricity, for the purpose of increasing the use of electricity within the area served by the Tennessee Valley Authority.

Under the administration of President Franklin D. Roosevelt, with tremendous sums being spent for various forms of projects, a central agency for purposes of planning in connection with public works was created. This developed into the National Resources Committee, and subordinate to it is the Water Resources Committee, which includes representatives of various bureaus interested in phases of water development and use. This latter body is designed as a coordinating body and central clearinghouse of information upon water resources problems. Since these problems are so varied, involving such diverse matters as navigation, flood control, power production, and irrigation, and since these are related to so many other problems of such apparently alien nature as forest control, wild-life conservation, and farming, it would appear on the surface that such a central body would be desirable. However, the very magnitude and variety of the problems are such that too much by way of "planning" should not be expected, although no doubt much can be done by bringing together representatives of the various bureaus likely to be concerned when new projects are being considered, for the same project may by some adjustments be made to serve several ends. Federal bureaus have by no means been unconscious of this mutual interest, and a great deal of coöperation, developed by experience, has existed in the past. However, when a large campaign of expenditure is being hurried to completion, a formally constituted agency is especially necessary.

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CHAPTER XXXVI

Agriculture

Fundamentally a State Problem

The Constitution grants to the federal government no direct powers in relation to agriculture, except in so far as the products of the land enter into interstate or foreign commerce. The development of our agricultural resources and their control would appear to be matters for the exercise of state jurisdiction. As a matter of fact, however, the federal government has taken the lead both in fostering agriculture and in exercising powers of control over it.

In the period before the Civil War the states contented themselves with granting some aid to agricultural societies, and it was not until the end of the nineteenth century that departments of agriculture began to appear, but these spread rapidly and soon after the opening of the present century most of the states had such departments.

The states now carry on experiments and demonstrations in agricultural production, conduct educational campaigns, and exercise extensive regulatory powers. They establish quarantines against animals affected by disease, test cattle for tuberculosis, enforce regulations against the adulteration of feedstuffs, and protect the public from unwholesome milk and dairy products. In the control of tuberculosis, whole areas are inspected and approved, the diseased cattle being destroyed under an arrangement by which compensation to the owner is borne partly by the state and partly by the United States. Campaigns for the eradication of insect pests are carried on, and assistance is given to the formation of marketing associations. In all these activities the state departments often have the cooperation of the United States Department of Agriculture.

The Department of Agriculture

Curiously, the present Department of Agriculture had its origin in the Patent Office, when this bureau was in the Department of State. Probably it was the relationship of the Patent Office to inventions in the field of agriculture that led to its association with other agricultural interests. In 1849 the Patent Office was transferred to the Department of the Interior. In 1862 an independent organization, called the Department of Agriculture, was established, and in 1889 the head of the department was admitted to the cabinet. The Department of Agriculture now has grown into a great establishment, functioning in a multitude of fields and engaging in many activities only indirectly connected with agriculture.

Sources of Federal Power

In exerting its influence upon agriculture the federal government has drawn upon the commerce clause, the taxing power, the treaty-making power, and, most important of all, the power to appropriate money.

Early Federal Activities

The gathering of statistics upon agriculture was one of the earliest of federal activities in this field and began about a hundred years ago. The collection and distribution of seeds and plants appear to have had even earlier origins. However, the great growth in the influence of the federal government in agricultural matters began in 1862, the year that witnessed the establishment of the independent "department" of agriculture. It appeared in the form of an aid to education.

The Land Grant Colleges

Under the first Morrill Act, in 1862, public lands were given to the states for the maintenance of agricultural and mechanical colleges, and under the Hatch Act, in 1887, provision was made for payments from land sales to be used in aid of agricultural experiment stations in connection with these "land grant" col-

leges. These two acts have been followed by numerous acts along the same lines. One difference between the earlier and later acts lies in the fact that the latter have appropriated funds directly from the Treasury. Another important difference is that while the act of 1862 provided for grants with no strings attached, there has been a tendency in subsequent acts to require an increasing degree of federal supervision over the use of the funds. Important among these later acts was the Smith-Lever Act of 1914, under which the federal government began the process of granting aid to the states for the maintenance of agricultural agents who give advice and carry on demonstrations for the farmers, and home demonstrators who assist farm women in the field of home economics. This act followed the "matching" principle, under which the state matched approximately dollar for dollar the federal grant.

The Office of Education performs some functions of a formal nature in relation to the land-grant colleges, but has little regulatory power.¹ The Department of Agriculture has much closer relations with these colleges, except in respect to grants in support of industrial training. The college experiment stations carry on field investigations in cooperation with the department, and the agricultural agents and home demonstrators make use of its studies and publications. Much of the work of these agents and demonstrators is not merely technical in nature but has a social welfare aspect, and the department, through its close association with them, is drawn into a form of educational work. Moreover, in recent years, under the Agricultural Adjustment Administration and the Soil Conservation Service, the agricultural agents have been used as a field service for the Department of Agriculture in its crop control and soil erosion campaigns.

Recent Functions of Agricultural Agents

There is no doubt that these agents, strategically distributed throughout the country, have been an effective force in presenting the aims and purposes of the federal administration upon agricultural problems. Such a program is more effective when it

¹ See p. 735.

does not have the appearance of a campaign of propaganda. Forum discussions in which both sides of a proposed program are presented are much more effective over a term of years in producing good will than any pressure campaign could be. It has even been suggested that these agents might become a permanent force to be used by the administration in power for the control of the farm vote. However, it should be noted that the agricultural agents are under the supervision of the state agricultural colleges and that the actual selection of agents is made by the local county authorities, although the choice may be limited to a list prepared by the state director of agricultural extension work.

The Food and Drug Administration

One of the best examples of the use of the commerce clause appears in the Pure Food and Drug Act, which is enforced by the Food and Drug Administration of the Department of Agriculture.2 This act, designed primarily in the interests of health, nevertheless has incidental effects upon agriculture, since it deals in large part with the products of agriculture. This same bureau enforces other similar laws dealing with ineffective or injurious insecticides and fungicides, standards for teas and for milk imported into the country, standards for certain naval stores such as turpentine, and the labeling of caustic poisons. Some of these laws are valid as an exercise of the power over foreign relations as well as of the commerce clause. The Meat Inspection Act also involves an exercise of commerce jurisdiction.

The Packers and Stockyards Act

The Packers and Stockyards Act was upheld by the Supreme Court in a decision which carried the commerce clause to great lengths.3 It prohibits unfair and discriminatory practices in connection with transactions by packers and stockyards, and requires reasonable services and charges by the stockyards. Its purpose was primarily to prevent combinations of packers from holding down prices paid for cattle and to prevent discrimina-

²See p 749. ³See p 568.

tions injurious especially to the small farmers with few cattle to sell. The Secretary of Agriculture enforces the act. His powers in this respect are not very different from those exercised by the Federal Trade Commission in relation to business in general.

Seed Grading

The Department of Agriculture also enforces the Federal Seeds Act, which prohibits the importation from abroad or transportation in interstate commerce of adulterated seeds, the Grain Standards Act, which empowers the Secretary of Agriculture to fix standard grades for certain kinds of seeds, and various other laws in the interest of farm products which enter into interstate or foreign commerce.

Oleomargarine

The power of Congress to levy taxes has been exercised through a tax of one fourth of a cent a pound upon oleomargarine not yellow in color, and of ten cents a pound upon oleomargarine which is yellow in color. These taxes are evidence of the influence of the dairy interests, which felt the competition of oleomargarine, especially when the latter had the yellow appearance associated with butter.

Futures

For many years there has been prevalent among farmers a feeling that the manipulations of speculators upon the exchanges have tended to lower the prices of farm products or to keep the prices paid to the farmers below those secured by the speculators. The defense of the speculators has been that their actions in fact have stabilized prices for the farmers, who may even sell their grain at a fixed price as it stands in the field, transferring to the speculator the risks incident to price fluctuations—that the farmer is guaranteed his price, and the speculator, promising to deliver to the miller at a future date for a certain price, has taken the chances of a rise or fall in prices as of that date. However, as a means of discouraging "dealing in futures" for speculative purposes Congress levied a tax of two cents a pound on cotton sold for future delivery. Subsequently, the Commod-

ity Exchange Act of 1936 (an extension of a similar act of 1922 dealing only with grain futures) was passed. This act provides a machinery for the approval of exchanges in certain farm products and sets up regulations designed to curb the amount and type of speculative transactions, particularly in futures. Certain forms of futures transactions, such as "hedging," are recognized as valid. The act is enforced by a commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General.

Research

In addition to its regulatory activities, the Department of Agriculture has for years carried on investigations into nearly every conceivable phase of farm activity, and the results are published and made available to farmers. These investigations not only cover subjects relating to agricultural methods, such as methods of cultivation, crop rotation, soil conservation, animal feeding, stock judging, farm bookkeeping, and the like, but go into various phases of farm life with a view to improving the comfort and the esthetic environment of the farmer and his family.

Departments Other Than Agriculture

Other bureaus than those of the Department of Agriculture have contributed to this program of agricultural aid. Notable among them are the Bureau of Reclamation in the Department of the Interior, which provides irrigation facilities in arid regions and the various agencies engaged in providing electrical power. These have been discussed elsewhere. Even the Department of State performs functions of great interest to agriculture in the making of trade agreements affecting import duties upon foreign products. In this way agriculture is affected by actions under the treaty-making power.

Credit Through the Federal Reserve System

Another form of federal aid to farmers has been the extension

^{*} See p 699.

⁵ See p 238

of credit both in the form of long-term mortgage loans on land and short-term mortgages on cattle and annual crops.

American farmers had not felt the need of credit facilities until nearly the close of the nineteenth century. The "extensive" cultivation of that period did not call for much expenditure for machinery or fertilizer
Increased demand for agricultural products was met simply by cultivating more land. The local storekeeper, the hardware merchant, and the commission man extended most of the little credit that was needed. With the exhaustion of the free land the cost of land went up and "intensive" agriculture began to succeed the old extensive system. A credit system became necessary. Country banks in great number were then established and other local agencies came into being. They were not sufficient, however, to supply the need. The Federal Reserve System did not have aid to the farmer as one of its primary aims. The farmer usually needs loans of longer duration than the short period that meets the need in commercial transactions. The Federal Reserve System did, however, permit loans secured by mortgages on farm lands, maturing in five years or less. The farmers also were recognized in the act in that while commercial paper matured within three months, agricultural paper was given up to six months In 1923, provision was made for the rediscount of agricultural paper maturing in nine months.

Federal Land Banks

The demand for long-time farm credit was met in 1916 by the establishment of the Federal Land Bank system. Under the provisions of this plan a group of ten or more farmers who desire to borrow money on farm first mortgages for specified agricultural purposes are formed into a National Farm Loan Association. This element in the system is an American adaptation of the cooperative idea that is common in Europe. Each farmer member subscribes for stock in his association to the value of five per cent of the amount of his loan, and this stock is held by the association as collateral security for the loan. The Association obtains the funds through the Federal Land Bank of that district and at the same time subscribes for stock in the Federal Land

Bank to the value of five per cent of the total amount of the loan. This stock is held by the bank as collateral security for the loan. The effect of these various provisions is to make the members of an association each liable for defaults of other members to the extent of five per cent of his own loan. The Federal Land Banks obtain the money for loans by the sale of stock and by issuing their consolidated bonds. Where there is no local association, the Federal Land Bank may make loans direct to borrowers.

The country is divided into twelve districts, in each of which there is a Federal Land Bank. The whole system was placed under the general administration of a Federal Farm Loan Board at the time it went into operation.

Joint-Stock Land Banks

Joint-Stock Land Banks also were authorized by the act of 1916. They were private corporations, making loans directly to farmers, without the intermediate Farm Loan Associations and subject to somewhat less severe restrictions than those applying to the Federal Land Banks. No loans are now being made through these banks and they are being liquidated.

Federal Intermediate Credit Banks

In 1923, Federal Intermediate Credit Banks were established to provide comparatively short-term loans, not secured by the cumbersome process of land mortgage. There are twelve of these banks, located in the same cities as the twelve Federal Land Banks, and with the same persons for directors. They have authority to discount agricultural paper with a maturity of not more than three years from banks and various types of agricultural associations. Under certain circumstances they may make direct loans to agricultural associations. Thus, their relations are with organizations and not with individual farmers. Funds are secured by the sale of stock and debentures. The United States owns all the capital stock but is expressly relieved from liability for debentures. Just as the Federal Land Banks were designed to meet the farmer's need for long-time credit, the

Federal Intermediate Credit Banks were designed to meet the need for credit in purchasing cattle and the like, which calls for longer terms than those usually permitted by the Federal Reserve Banks but does not call for such long terms as those needed for the purchase of land. As a matter of fact, most of the loans passing through these banks are for periods of from three to six months.

National Agricultural Credit Corporations

Privately owned corporations under federal supervision, serving the same general purpose, but authorized to deal directly with farmers, and known as National Agricultural Credit Corporations, were provided for in the same act, but this provision was repealed in 1933

The Federal Farm Board

In 1929 the Agricultural Marketing Act provided for a Federal Farm Board of nine members, including the Secretary of Agriculture. The duties of the Board were in part educational, as it was authorized to promote education in the principles of cooperative marketing in agriculture and to encourage the development of cooperative associations, as well as to conduct investigations in agricultural economics. The Board also might engage in banking operations in that a revolving fund of \$500,000,000 was authorized to make loans to cooperative associations to assist in the marketing of agricultural products. A very controversial feature of the act was the authorization to lend from the revolving fund to "stabilization corporations" for the purpose of controlling surpluses and maintaining prices. It might render assistance in the formation of producer-controlled clearinghouse associations and might enter into agreements with cooperative associations for price insurance upon agricultural products. The provision for price maintenance through the control of surpluses was the most debatable feature of the act and constitutes a radical departure from previous legislation. This phase was abolished by executive order in March, 1933.

The Farm Credit Administration

This executive order was issued under authorization of an act of Congress of March 3, 1933, which gave the President certain broad powers to reorganize the federal administration. In addition to abolishing the price maintenance feature of the Marketing Act, this order transferred to an officer to be known as the Governor of the Farm Credit Administration all the powers and duties of the Federal Farm Board. The powers of the Federal Farm Loan Board were transferred to the Farm Loan Commissioner (later changed by law to Land Bank Commissioner), subject to the control of the Farm Credit Administration, which meant in effect that the governor of the Farm Credit Administration would exercise the powers of the old Federal Farm Loan Board. Various other powers relating to loans for the aid of agriculture, previously exercised by the Department of Agriculture, the Treasury Department, and the Reconstruction Finance Corporation, also were transferred to the Farm Credit Administration.

From time to time other agencies for extending credit to the farmers have been set up and placed under the general supervision of the Farm Credit Administration, so that at present most of the various forms of agricultural credit offered through federal agencies are controlled by it. These agencies are:

- r. The Federal Land Banks, referred to above. They are the chief agency for long-term, twenty- to thirty-year, credit based upon first mortgages upon land.
- 2. The Federal Farm Mortgage Corporation. This body raises funds by the sale of bonds, guaranteed by the federal government, which are administered by the Federal Land Banks. These funds are loaned to farmers upon less stringent requirements than those permitted from the regular funds of the Federal Land Banks and may be based upon second mortgages. This type of credit originated in the need to meet emergency depression requirements and furnish the basis for what is presumably only a temporary activity of the Federal Land Banks.
- 3. The Intermediate Credit Banks. They rediscount, for banks and agricultural organizations, agricultural paper maturing

in not over three years and not requiring land mortgage as security.

- 4. Production Credit Corporations. There are twelve of these. The United States government owns all their stock and they operate through Production Credit Associations, quite similar to the farm loan associations. Borrowers must purchase stock in their associations to the extent of five per cent of their loans. These loans are for short terms and usually are rediscounted by the Intermediate Credit Banks, which thus stand in somewhat the same relation to them as the Federal Land Banks do to the farm loan associations.
- 5. Banks for Cooperatives. There is a Central Bank for Cooperatives, and twelve District Banks for cooperatives. The directors of each district bank are the same persons as those of the Federal Land Bank for the same district. They provide both long-term loans up to ten years to aid in the purchase of machinery and equipment and short-term loans to aid in marketing.
- 6. The Emergency Crop and Feed Loan Section. This is an administrative section of the Farm Credit Administration. It makes loans for the production of crops and the purchase of feed. These loans are secured by the crop to be produced or the livestock to be fed and are made only to persons who do not qualify for loans from other agencies.
- 7. Credit Unions. These are local organizations providing small loans, of not over \$200, maturing in not over two years. They are not limited to rural areas but are supervised by the Farm Credit Administration.
- 8. In addition there are the Joint-Stock Land Banks referred to above, and certain Regional Agricultural Credit Corporations, both of which are in process of liquidation.

The Farm Security Administration

In addition to the agencies under the supervision of the Farm Credit Administration, the Farm Security Administration (formerly the Resettlement Administration) has made small loans, secured in a variety of ways. The loans were to persons who did not qualify for loans from other agencies. The humanitarian purpose of emergency relief was the chief factor to these

loans, with much less emphasis on the security for repayment than would be required from the regular lending agencies.

The Commodity Credit Corporation

Another form of "loan" has been made through the Commodity Credit Corporation. However, the basic purpose of these loans has not been so much the extension of credit as the maintenance of prices, and therefore they will be discussed along with other agencies having this purpose in view.

The Decline of Agricultural Prosperity

Many explanations have been offered for the decline of agriculture which set in soon after the close of the World War. Of course, there were many factors in the situation. However, certain facts appear obvious. During the war there was a tremendous boom in American agriculture. Prices reached unprecedented heights and a great expansion took place in the areas under cultivation. Prices paid for land were justified only by a belief in the permanence of the boom. After the war was over, a measure of this extraordinary farm prosperity continued, maintained, at least in part, by purchases from abroad, which were made possible only by loans made by the United States to foreign countries. With the cessation of these loans purchases declined. Then a period of depression began in foreign countries and the world depression was under way. The American tariff, preventing foreign sales in this country, which would have provided cash with which to buy our agricultural products, also has come under criticism from high tariff opponents, although supporters of high tariffs have replied that the protection thus afforded to American industry increased our own purchases of agricultural products. At any rate, the income of the agricultural population in relation to the total national income appears to have experienced a steady decline during this long period.

The Collapse of Urban Prosperity

Meantime the urban elements had been experiencing a boom, but the stock market crash of 1929 marked the close of this, and

the collapse of urban prosperity resulted in a decline in the domestic consumption of agricultural goods. By the year 1932, banks were failing in great numbers in agricultural areas, especially in those regions that had undergone great expansion during the boom period. Farmers who had mortgaged their lands during the boom were unable to meet payments. Their efforts appeared to defeat their own ends, for when they expanded production in order to secure larger crops, they merely produced national surpluses for which there was no corresponding increase in demand from the cities. As a result, prices actually declined through the farmers' own efforts. As the country banks failed and savings were lost, further contributions were made to rural distress.

The Farm Board and Surplus Control

Meantime, numerous schemes for relieving the plight of the farmer, and particularly of dealing with surpluses, had been put forward, and in 1929 the Agricultural Marketing Act, referred to above, authorized the Farm Board to make loans from its revolving fund to "stabilization corporations" which might purchase and store surpluses of farm products in years of overproduction. It was contemplated that the stored commodities would be sold later, perhaps when there was an undersupply, that is, an amount below normal. Thus, the supply of a commodity would approach a constant "normal," and the price would tend toward less fluctuation. Unfortunately, a number of factors intervened in the working out of this program. In the first place, since the purpose of the act was to maintain prices in certain commodities, farmers were tempted to increase production in these commodities, assuming that even though a surplus were produced, the Farm Board would intervene and not only maintain prices but take over the surplus. Thus, an effort to control surpluses actually tended to aggravate the evil.

Another difficulty in carrying out such a program was the political factor. While farmers would be pleased with the purchasing operations of the Farm Board, they might be disgruntled

⁶See p 718.

over its subsequent sales, which would tend to reduce prices, for the farmers would not be likely ever to believe that prices had risen high enough to justify the Farm Board in taking any action to reduce them.

Crop Restriction

Upon the advent of the "New Deal" of President Franklin D. Roosevelt, a new plan was evolved. Since the problem was one of "overproduction," that is, production in such large proportions compared with the demand as to bring prices that were considered too low, it was proposed not to purchase the surplus but to prevent it from coming into being. The Agricultural Adjustment Act of 1933, embodying this scheme, provided among other things for payments to farmers who would reduce their crops of certain commodities to a fixed proportion below the average amounts previously produced by them. It was expected that the reduction in production would lead to a rise in prices of these products. Thus, the farmer would profit, first, from the pavments made him for reducing his crop area, and second, from the rise in price. Payments to farmers, however, were not to be made from general taxes. A special "processing tax" was laid upon the first processors of the commodity, as, for instance, in the case of wheat, upon the miller. Presumably this tax would be passed on by the processor to the consumer in the form of higher prices. Thus each commodity was expected to produce sufficient funds to equal the payments for its own crop reductions.

Acreage and Quantity Reductions

Certain difficulties arose in connection with this program. In the first place, although the act permitted a reduction in the quantity a farmer might produce, the plan at first took the form of acreage reduction. It did not prevent a more intensive cultivation of the number of acres actually planted. This, however, was a matter that could be remedied in the future. In fact, such later laws as the Bankhead Cotton Act and the Potato Act of 1935 contemplated such quantity restrictions.

Effects Upon Labor

Second, the restrictive program threw a great many farm hands out of work, especially in the case of crops such as cotton, which depend so largely upon human labor. This difficulty was met temporarily by relief funds, dispensed in various ways, for people out of work.

International Effects

Third, in the case of commodities, such as cotton, which are exported in large quantities, the reduction of acreage here merely acted as an incentive to the growth of cotton in other countries. Brazil, for instance, experienced an expansion in cotton acreage contemporaneously with our campaign of reduction. Possibly some foreign expansion at American expense was due in any case, but our acreage reduction appears at least to have accelerated the process. Another factor in the case of such commodities as cotton is that the price is settled not by the American supply alone, but is a world price, determined abroad in a world market. As a result, at least that portion of the American product that is exported must be sold at a world price. To keep that price high, American crop reductions must be sufficient to raise the price of all cotton. If foreign crops increase, American acreage reduction must be carried farther. The complications arising from the international situation present a difficult problem. One solution, seriously offered, has been for this country to close its borders to all trade except in a few commodities and proceed on a purely national basis, pushing agricultural prices to such levels as we desire. However, few would be willing to go to such lengths. There would be difficulties, political and economic, in maintaining such a "Chinese wall" against foreign goods. Another proposal has been to protect the American market, maintaining our own price level, while selling abroad at the world price.

Compulsion

Still another difficulty in carrying out the agricultural program arose from the fact that crop reductions were purely voluntary.

Farmers who did not want to take advantage of the federal payments for crop reduction could continue to plant as they chose. As a result, many farmers, knowing that acreage on other farms was being reduced, increased their own plantings in the expectation of cashing in on the high prices, thus throwing the federal plan out of balance.

In the case of cotton this problem was met in the Bankhead Cotton Act of 1934. Under this act a prohibitive tax amounting to half the market price of lint cotton was paid on all cotton produced in excess of the number of bales allotted to each farmer or produced by a farmer who did not agree to cooperate in the program of the Agricultural Adjustment Administration with respect to the reduction of production in agricultural commodities as the Secretary of Agriculture might from time to time prescribe. This provision was not to go into effect unless the Secretary should find that two thirds of the producers of the country desired it. The act in effect provided for compulsion upon unwilling producers. The Kerr Tobacco Act of the same year, along similar lines, provided for restrictions upon tobacco production.

Extension to Other Crops

As restrictions continued, still another difficulty arose. Farmers who reduced acreages in one crop planted other crops on the land thus left free, and this produced surpluses in these new crops, which then in turn must be subjected to control. For instance, land formerly in cotton was used for peanuts. Then, in 1934, peanuts were subjected to restriction. The farmers then turned to potatoes. However, this dislocated the potato business. Plantings in Texas were injuring the New England farmers. A law was needed for potatoes.

The Potato Act of 1935, as finally adopted, reached the most extreme lengths of control, for it levied a tax on potatoes produced in excess of the quota and made it a criminal offense to sell potatoes in other than government-stamped packages, made it a criminal offense for the housewife to buy potatoes which were not in such packages bearing the federal stamp, and furthermore made it a criminal offense for farmers or others in pos-

session of information concerning the production or sale of potatoes to refuse to furnish such information to the federal officers. Apparently realizing that "bootlegging" of potatoes might become a problem, every farmer was to become a potential informer upon acts of his neighbors. The application of the tax in this act was made dependent upon a favorable vote of a majority of the potato growers of the country. The extreme nature of this act may have been necessary if an effective agricultural control was to be established, but the potato law brought a storm of disapproval. Its restrictive provisions were coming too close to the consumers. Farmers who profited from federal payments may have been submissive to restrictive crop provisions, but consumers who were receiving no such palliatives were not receptive to the penal provisions upon illegal purchases of potatoes.

United States v. Butler

The Potato Act probably would have been modified, but before that could be done, the Supreme Court came in with a decision, in the case of United States v Butler, holding the whole program unconstitutional. The case arose over the collection of processing and floor taxes on cotton under the act, and in its opinion the court said that Congress "had no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish these ends by taxing and spending to purchase compliance." The tax was invalid as an attempted invasion of the rights of the states.

The elimination of the crop control activities of the Agricultural Adjustment Administration did not by any means, however, prevent efforts to accomplish the same ends by other methods. The Butler decision had held the processing tax unconstitutional, and obviously crop control through direct regulation was invalid. However, payments out of the general treasury, involving no specific tax for use in crop control, could still be made to farmers, and presumably some conditions could be attached to the grants.

Soil Conservation

Soil conservation had long been an interest of the Department of Agriculture. The American extensive type of cultivation had encouraged an enormous wastage of top soil through erosion. Advice issued by the department upon agricultural problems had involved among other objectives the correction of these wasteful methods. Forest protection in the Department of the Interior was in part a program of erosion control. In more recent years the soil erosion program has undergone considerable expansion.

Meantime, forces were in operation which brought the problem home to the public in dramatic fashion. The war and postwar agricultural expansion had led to the plowing up of large areas previously in grass and used for grazing. The light soil of these areas had been held by the grass. Then a series of years of drought occurred, and the soil, reduced to a dust, was picked up by the winds and carried often for hundreds of miles in vast yellow clouds. On some of these occasions the dust haze was observable even along the Atlantic coast. In the "Dust Bowl," in which this wind erosion was occurring, the dust was wafted from place to place and piled against fences and buildings. A process was taking place similar to one that had been going on for centuries in Asia, in which dust was carried by the wind from central regions and deposited in a thick layer in northern China. This wind deposit, known as "loess," is easily eroded by the streams, and the Yellow River, laden with the yellow soil, spreads over the plain and is so clogged with shifting mud bars as to be of little use to navigation.

The American public was alive to the need for action upon a soil erosion program. The federal administration combined this public interest with its program of crop control. The special programs of the Bankhead Cotton Act, the Kerr Tobacco Act, and the Potato Act of 1935 were abandoned, but the crop control work of the original Agricultural Adjustment Act was continued, metamorphosed into a soil conservation program. The Soil Conservation and Domestic Allotment Act of 1936 mentioned among its objectives the re-establishment of the ratio between farm and

nonfarm incomes prevailing from 1909 to 1914. Funds granted under the act were to be administered temporarily by the Secretary of Agriculture. Eventually, however, they were to become grants-in-aid to states which submitted plans approved by the Secretary and set up an agency to carry them out. Under this plan, farmers were paid for abandoning soil-depleting crops and substituting soil-conserving crops in their stead, and by a process of definition the soil-depleting crops became those which previously had been restricted as involving national surpluses. This program, however, must be financed from the general treasury, and it involved the weaknesses that had developed in the original program. It was not sufficiently coercive to accomplish fully the desired ends.

The Agricultural Adjustment Act of 1938 recognized the need of enforcement provisions if a program of crop reduction was to be carried out. In the form of an amendment to the Soil Conservation and Domestic Allotment Act, it provided for marketing quotas upon tobacco, corn, wheat, cotton, and rice, with penalties in the form of a percentage of the market price or a fixed amount per pound or bushel for any of these commodities sold in excess of the quota. A marketing quota for any of these commodities was not to go into effect unless approved by a two-thirds vote in a referendum among the producers of that commodity.

Remaining Features of the A.A.A.

The Butler decision did not apply to all the activities of the Agricultural Adjustment Administration. It still had power to assist in agricultural stabilization by encouraging the export or other diversion of commodities, and some minor functions.

The Commodity Credit Corporation

Another activity, based in part on the Agricultural Adjustment Act and in part on other acts, was carried on by the Commodity Credit Corporation. This body is a lending agency, but its loans are in reality a part of the price-raising program. In years of large surpluses it has made loans on the security of certain

commodities held in storage, particularly on corn and cotton. These loans, however, are made upon a valuation above the current prices of the commodities involved. Their purpose is two-fold: first, to remove from sale surplus amounts of any particular commodity and thus raise prices upon the remainder, and secondly, to guarantee a price to producers who will thus store the surplus. If prices rise the following year to the level of the loans, the federal government is repaid. If prices do not so rise, the farmer has received his price and the government may sell the commodity for what it can. Thus, a bottom is placed under the price structure and farmers have a guaranteed minimum for their products.

Farm Mortgages

One other form of aid to farmers afforded during this emergency period should be mentioned here. Farmers in certain areas were suffering particularly from inability to meet mortgage payments. The state of Minnesota in April, 1933, declaring that the emergency called for the exercise of the police power for the general welfare, extended until May 1, 1935, the time for redeeming existing mortgaged property from foreclosure, provided a state court deemed an extension just and reasonable. The act was to terminate on May 1, 1935. It was contended in the United States Supreme Court in Home Building & Loan Association v. Blaisdell that this impaired the obligation of contracts. The Court, however, held the act valid, stating that it was not enacted in the interest of individuals but of society, that it had in view the interests of mortgagees as well as mortgagors, that the conditions laid down were not unreasonable, and that the legislation was only temporary.

Subsequently, in June, 1934, Congress passed the Frazier-Lemke Act as an amendment to the bankruptcy act, permitting farmers, upon being adjudged bankrupt, to purchase their property at its appraised value, paying for it in installments, or if this was refused by the mortgagee, gave to the farmer a moratorium of five years during which he should pay a reasonable rental, with the right at the close of the period to purchase the property at its appraised value. This, the Supreme Court in

Louisville Joint Stock Land Bank v. Radford, held to deprive the mortgagees of property rights in violation of the Fifth Amendment. In August, 1935, this act was amended, providing for a three-year moratorium and then only if the emergency continued for this length of time, safeguarding the mortgagee's lien until the debt should be paid, permitting him to protect the property by bidding at a sale, and making other changes in the sweeping provisions of the former act. The amended act was upheld in Wright v. Vinton Branch. Thus, both state laws under the police power and federal laws under the bankruptcy power, providing for a stay in foreclosures, have been upheld in emergencies if accompanied by proper safeguards in the interest of mortgagees. However, the amended Frazier-Lemke Act came rather late in the depression. Many farm mortgages were foreclosed during the depression period. Some relief was afforded by insurance companies which granted delays, but too many farms had been mortgaged during the high expectations of the boom period and such measures were not always sufficient to afford real relief. Violence in communities confronted with wholesale foreclosures were reported during the acute stage of the depression. Peace in these rural regions came only after the more hopeless cases of indebtedness had been cleared off and after an improvement in economic conditions had taken place.

Relief

The rural areas have received the benefits of various forms of federal relief during the depression period. Farm laborers thrown out of employment by the crop reduction program were cared for under the relief program. The projects of the Works Progress Administration, however, could not be spread sufficiently to take care of the cases of need. In some instances, farm families had been living on submarginal land which was just sufficient to provide a living in normal times. When confronted with an economic depression they became cases for relief. Such cases were better adapted to the rural rehabilitation program of the Resettlement Administration (now the Farm Security Administration). Under this program the farmer might be moved to a

more fertile farm and provided with a small house and with farming equipment. The old farm would be acquired by the Administration for other uses, such as for grazing land or for a bird refuge, and the former owner might be set to work on it as a relief project. By such methods, and by small loans at low interest rates, the new farm was financed. Instruction in improved agricultural and homemaking methods were given and each family was treated as a special social service case. This program is not so much an agricultural program as merely the rural phase of a broad program of social service work. Its success is yet to be determined, since years of experience will be necessary before we can know whether living habits have been changed permanently.

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CHAPTER XXXVII

Education and Highways

Education

The United States has proneered in public education. At first, education was a matter of private means, but eventually taxation took the place of the pooled resources of the parents in each community, and while private schools still function in considerable numbers, most of the children of America attend the public schools.

Taxes for the support of the schools at first were laid in the local districts and control also was left to the localities, but as the need for equalization of opportunities grew, there was a tendency for the central state government to take over a larger share of the responsibility. The ultimate authority to lay out school districts and determine their powers has always rested, of course, in the state legislature, except in so far as the latter has not been restrained by constitutional provisions, although its direct exercise of control over matters of curriculum, teacher selection, textbooks, and the like, belongs to the recent period. The schools have always been regarded as a distinct type of state activity and have been controlled by agencies independent of the ordinary local administration. In fact, while the township in New England and the county in some other parts of the country are units of school administration as well as of local government, in some other states the school districts are laid out in areas not corresponding to the governmental units. Even where the geographical units are the same, the schools sometimes operate to a large degree independently of the local government. In cities, for instance, the schools are not usually included within the administrative departments of the city but are controlled by a board of education elected by the people.

School districts are classed as quasi corporations. While not enjoying the full status of corporations such as cities, they do enjoy much the same status within the limits of their functions. They may make contracts, may sue and be sued, and may levy taxes for the support of the schools, subject always to limitations laid down by the state constitution or the legislature.

School districts vary greatly in size, population, and wealth. Differences in the wealth of these districts make for great variations in the quality of the schools. This in itself violates the principle of equal opportunity which has been the ideal of the American school system, and as a result a number of plans of state aid have been devised. Some of these base the amount furnished by the state upon the number of pupils and some upon the number of teachers. Others meet the issue squarely by making grants to the districts in proportion to their needs with the aim of equalizing the opportunities for education through the state. Delaware organizes the state as a single district, while North Carolina takes over the whole expense of school maintenance in all districts for a school year of eight months.

The chief administrative officer in the state school system is the superintendent of public instruction, commissioner of education, or officer of similar title. He belongs to the group of older officers of the state rather than to the second class of new officials. Usually he is elected by popular vote, in a few states he is chosen by the state board of education, and in a few others he is appointed by the governor. His functions may be performed in conjunction with the state board of education or with other special boards. He is the executive officer of the state board of education and his duties generally relate to the examination of prospective teachers, the selection of textbooks, the outlining of courses of study, the allotment of funds, and the furnishing of information and advice. However, since in most states the localities still exercise a broad control over local education, the powers of the state superintendent are limited in their scope.

The state board of education in some states is composed of certain state officers ex officio. In others the members are appointed by the governor or are chosen by the legislature. In general, it is the policy-forming body upon those matters for

which the state superintendent is the chief administrative officer. The administrative organization of city school systems follows a uniform pattern. A school board consisting of laymen who have little or no technical knowledge of teaching or school management is the governing body for the school system. The membership is usually less than a dozen. The most common method of choice is election by the people, but appointment by the mayor is followed in some places and appointment by the courts in others. Usually the members receive no compensation. The board controls the appointment of teachers, subject to rules fixed by state law governing the qualifications of teachers. From among those qualified, the board by its own rules chooses the teachers. It also spends the school funds, subject to such limitations as may be fixed by the city council. In some cases it may even levy taxes without need of consulting the council. Probably its most important function is the choice of a superintendent of schools, who becomes the head of the school administration. The board, properly recognizing the fact that its membership is not technically trained, normally will accept the advice of the superintendent, who, so long as he remains in office, dominates the administrative system. The schools, therefore, under this plan of organization, constitute a somewhat independent element in the administrative system of the city. They are not subordinate to the mayor or other chief administrative officer in the same manner as other departments are.

One of the most serious of our educational problems has been the small rural school with a single teacher. In the city schools, the teacher has had the advantage of a greater degree of specialization and the better physical equipment that can be more economically provided where there are greater numbers of pupils. To remedy this there has been in recent years a movement toward the consolidation of these small one-room schools into a single school with several teachers and better equipment. The children are transported at public expense between home and school, so that the rural school bus has become a national institution. Greater safety and comfort in this bus service is needed, but students of education believe that consolidation is essential to improvement in rural education. The "little red schoolhouse"

of romantic associations is giving way to modern efficiency, and the one-room school apparently is doomed.

The federal government plays only a small part in the educational activities of the country. In Washington, the Office of Education carries on studies of interest to educational administrators, furnishes information, and acts as a clearinghouse upon educational matters. It has, of course, no general regulatory powers over the state systems.

The federal government has made grants of lands and funds for specific educational purposes, and to some extent has exercised regulatory powers in connection with these grants. These aids have gone to the states for the maintenance of agricultural and mechanical colleges, agricultural experiment stations in connection with these colleges, agricultural agents and home demonstrators, and industrial training. The Office has some functions in relation to land-grant colleges, receiving their annual reports and seeing that certain formal requirements are met. However, its regulatory powers in respect to the land-grant colleges are small. In fact, the Department of Agriculture has much closer relations with these colleges. In respect to industrial training the Office of Education has more extensive regulatory powers. It is the administrative agency for funds under the Smith-Hughes Act of 1917, making grants in support of industrial subjects in the state schools and the training of industrial teachers, and under subsequent acts dealing with industrial education. Formerly these funds were controlled by the Federal Board for Vocational Education, but this board has been reduced to the position of an advisory body and actual administration placed in the Office of Education.

A number of other federal bureaus have close relations with specific types of educational institutions—the Forest Service with schools of forestry, the Bureau of Animal Industry with veterinary schools, and the Bureau of Home Economics with departments of home economics in schools and colleges. Others, such as the Public Health Service and the Children's Bureau, carry on work that brings them into relationship with educational systems. The federal government also maintains and administers such edu-

¹ See p 711

cational institutions as Indian schools under the Office of Indian Affairs and schools for children at army posts, as well as such specialized institutions as those for the training of army officers at West Point and naval officers at Annapolis.

In addition to these activities of a permanent nature, considerable emergency federal aid has gone to the states during the recent economic depression. The Public Works Administration and the Works Progress Administration have erected schools and made repairs upon school buildings, and the National Youth Administration, and its predecessor organizations that furnished the same type of aid, have afforded financial assistance to students Such aid was made available only to those who were unable to continue their education without it. It was considered desirable not only from the educational but from the economic point of view as a means of reducing the number of persons entering industry at a time when there was already much unemployment. Probably many students were enabled to remain in school with this assistance. However, the plan involves the investigation of the financial status of large numbers of students, and to do this properly would call for the employment of a trained staff of investigators, so that the cost of administration would be out of proportion to the assistance given. The determination whether the financial status of an individual is such as to permit attendance at college is more difficult than is the task of the social worker in selecting cases for relief.

There has been considerable agitation in recent years for a general extension of federal aid to state schools. This is supported by the same arguments that have been advanced for the assumption by the states of responsibility for local school support. However, the variations between states are not comparable to those between school districts. There is also a strong "statesrights" feeling in relation to the schools and a well-grounded fear that federal support will be followed by federal control. Probably much might be accomplished by a greater uniformity in our standards of education. On the other hand, it is felt that since education is not so easily standardized as is road building, it is best not to risk the imposition of national standards upon states that might better be experimenting along different lines. Prob-

ably the pressure for federal aid is to a considerable extent a simple desire on the part of some states to shift the burden of taxation to other shoulders, but the argument for an equalization of opportunity for children between poor and wealthy states has weight, and as the feeling of national unity grows, the pressure for national support may be expected to increase.

Highways

The history of highway construction and maintenance in the United States constitutes one of the best illustrations of the tendency toward the transfer of power to larger governmental units. In the Colonial period and the early period under the Constitution, highways were almost entirely a matter of local concern. Most of the traffic was of local origin. Travelers from a distance were few in number. Interstate transportation was small and whenever possible was carried on by water. It was only proper that the people of each community should maintain their own highways.

During this period the roads were kept up by the local governmental units—townships in New England, counties in the South. These in turn set up smaller road districts, and the men between certain ages in each district were required to "work the road" a certain number of days each year under the direction of an overseer for the neighborhood or to pay a certain fixed sum for the hire of a substitute. This "militia" system was reasonably satisfactory at the time and was an easier burden than a tax upon men who found money scarce but could afford to give of their own labor at convenient periods. It did not produce expert road building but such was not needed.

In the second third of the nineteenth century there was some recognition of state interest in highways and a considerable number of turnpikes were built by private companies under state charters. They reimbursed themselves by charging tolls at points along the road. Toll bridges, constructed by private companies, became a common phenomenon.

The next step in highway construction appeared in the last decade of the nineteenth century in the form of state aid, the

state furnishing perhaps half and the localities half of the cost of maintaining certain main roads. It was inevitable that state aid should be followed by state control over construction and maintenance. At the same time there was a tendency to substitute taxes for the "militia" system. However, since the railroads were supplying the chief means of transportation over long distances, the pressure for better roads was not felt severely. The railroads were favorable toward the principle of state aid in road building, since highways were not competing with them in transportation but were looked upon as feeders for the railroads.

With the coming of the automobile the country's road system has been revolutionized both in its planning and in its construction. A much larger part of the traffic upon the main roads is interstate. Neighborhood travel no longer is the dominating feature. In view of this fact, the road system has come to be regarded as a matter of state rather than of purely local concern, and the federal government has recognized a national interest by assuming a large part of the burden of construction and maintenance.

In most states there is a highway commission which chooses an official who acts as executive for the commission. The members sometimes are elected and sometimes are appointed by the governor. In other states there is a single elected or appointed highway commissioner. Since certain grants of federal funds have been made dependent upon the establishment of a state road authority, it has been almost a necessity that such authorities be provided. However, even without this federal stimulus it was inevitable under modern conditions that the states would centralize control over the more important roads.

A change in the highway system of such magnitude and taking place with such rapidity could not well have been financed on a pay-as-you-go basis. Large bond issues were necessary to spread the cost over a period of years. While this method of financing was sound under the circumstances, it too often happened that the roads for which bonds had been issued were worn out before the bonds were paid. At present there is a tendency to pay for highways out of current income. Moreover, highways are being constructed and maintained, not so much from general taxes, as

from specific taxes upon those who use the roads, and these are being proportioned as nearly as possible according to the amount of use that is made of the roads. Thus, the tax loses some of the characteristics of a tax and more nearly approaches a mere charge for the use of the roads. The gasoline tax, for instance, fairly accurately represents a charge proportioned to the amount of use that is made of the roads. Another instance of this type of financing is evident in the growing number of toll bridges, reminiscent of the middle period of our history. These toll bridges, however, have not all been constructed by private companies. Often they are publicly built and maintained, and the tolls are a charge that is made upon the users to pay off the costs of construction and maintenance.

The same forces that have compelled the states to use larger areas such as the county in place of small road districts, to institute state aid and state control over the main highways, and even in a few states to provide state control over all highways, have impelled the federal government to grant assistance in highway construction to the states. Originally given a somewhat flimsy claim to Constitutional sanction by appeal to the Congressional power to establish post roads, it is in reality a recognition of the fact that highways have taken on a national character. Automobile travel between the states has acquired such magnitude that the great highways connecting one section of the country with another carry a heavy proportion of interstate traffic. Recognition of this federal interest in national highways until recently has taken the form of a grant-in-aid on a "matching the federal dollar" basis, that is, the state paying half and the federal government half of the cost of construction, except in certain states containing large areas of federal public lands, where the federal government made an additional contribution. The state must make provision to maintain these highways and in the construction must meet certain standards set up by the federal administration. These federal powers are administered in the Bureau of Public Roads of the Department of Agriculture. The effect of the federal grants has been greatly to stimulate road construction, for each state desires to secure its share of the federal funds. An indirect result has been the establishment of state highway departments, for a provision of the federal law requires as a condition upon a grant that the state must have such a department. This not only provides a responsible authority with which federal officials can deal but insures the existence of a central state body for the better use of state road funds.

Beginning in 1933, as a relief to unemployment, the federal government abandoned the plan of matching the federal dollar. The Works Progress Administration (succeeding the Federal Emergency Relief Administration and the Civil Works Administration) could require a local contribution as a condition to a grant but was given authority to determine the proportion in each case, depending upon the ability of the community to pay. On the other hand, the full amount might be borne by the federal agency. The primary purpose in creating the Works Progress Administration was to provide employment, its highway work being limited largely to the smaller road projects, grade-crossing construction, and the like. This agency has dealt with local bodies directly without going through the central state authorities. The same plan has been followed by its companion agency, the Public Works Administration, which has made loans and grants to the localities Presumably the policy of federal grants without a fixed proportionate state contribution is temporary and will be abandoned in respect to federal aid that is not directed primarily toward unemployment relief.

Little objection has been raised in the past to federal grants in aid of state highways, for the amount of federal supervision accompanying the grants was largely limited to engineering problems reducible to a scientific basis. Standards of construction were set up, the choice of localities was subjected to control, and a state agency was required, but these limitations did not involve interference in broad controversial matters.

However, the way in which federal aid may develop into forms of control appears even in relation to highways. In the emergency act of 1933, the grants are made dependent upon meeting certain labor provisions, including a maximum thirty hour week and reasonable wages, while the emergency appropriation of 1934 contains the curious limitation that since "it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such

taxation are applied to the construction, improvement, or maintenance of highways," grants from it may not (with certain limitations) be made to states which do not spend upon roads an amount equal to their income from automobile registration fees, licenses, gasoline taxes and other special taxes on motor vehicles, owners, and operators.

At the present time the local unit of road control is the township in New England, the county in the South and West, and a combination of the two in parts of the Middle West, but the state has so encroached upon the localities by grant-in-aid and direct regulation as to leave them in a position of minor importance, with real control over only minor roads. Two states, North Carolina and Virginia, have eliminated the localities entirely from road administration. Beyond this, the process of integration has been carried a step farther, and the states appear to be fading from the picture much as the localities had before, and the federal government is becoming the major factor in an integrated system of national highways.

In one generation our highways have gone through a remarkable transformation. The crooked dirt road, cut up with ruts and dotted with mud puddles, has been replaced by long ribbons of asphalt or concrete which connect into a single national system every town of over a few thousand inhabitants. Even the federal funds have not been limited to interstate highways, but are used in part in the construction of local roads. The railroad did much to bind the sections of the country together, but the automobile and the national highway have all but obliterated state lines for the traveling public.

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CHAPTER XXXVIII

Health

A Recent Function of the State

Up to the time of the Civil War the control of disease was treated as a local problem. In fact, public health activities were negligible, for not until it was discovered that many diseases are carried by germs was any scientific method of eradication or prevention possible. The first boards of health seem to have been set up in seacoast cities for the purpose of establishing quarantine measures against the introduction from abroad of such diseases as cholera and small pox, scourges which periodically broke out at the ports.

It was not until after the Civil War that public health came to be recognized as a subject of concern to authorities of the state as a whole, while even more recently, with the growth of population, the increase of travel, and recognition of the means by which diseases are communicated, it has taken on some national aspects.

Local Authorities

Even yet, the primary activity in matters of health is left to local authorities. Cities and counties or townships maintain boards or departments, variously constituted, which exercise authority in problems affecting the health of their communities.

Rural areas usually rely upon a local physician who gives part of his time to his duties as health officer, or upon a board which normally contains some laymen and at least one physician, thus embodying both the lay and expert elements. Frequently the lay members are local officers who become *ex-officio* members of the board. The care of public health is the one governmental function recognized by even the politicians as not a fit field for

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rewards to henchmen whose only qualification is political activity. The dire results of inexpert guidance in health control are too obvious.

It is true, however, that even the requirement that there be a physician on the board may not be sufficient to provide the best administration, for something more of expert knowledge is needed than that of the physician who is trained in the cure rather than in the prevention of disease. Moreover, even the members of the boards who are physicians do not give their full time to the work, but carry it on along with their private practice. No doubt much better results would be obtained if the boards employed a full-time public health expert, leaving all technical matters to him, or even if the boards were abolished altogether and supplanted by a single full-time health officer. Cities have such full-time officers heading a department of public health, and a few counties have followed their example. Some states have authorized counties to employ nurses, and where counties take advantage of this opportunity, the nurse may be a useful assistant to the county health officer or board.

The work of a county board may cover such matters as quarantine, sanitary regulations, investigation of water supplies, and instruction in matters of health. The high death rate in child-birth in the United States might be reduced more nearly to the proportions obtaining in other civilized countries through instruction to expectant mothers and assistance to the needy. Instruction in the proper treatment of tuberculosis, particularly in its early stages, should reduce the death rate from that disease. During epidemics instruction can be given in the proper methods of safeguarding against infection. Particularly in the schools, work can be done in personal hygiene and in the prevention of disease. The practicing physician is concerned with the cure of disease, but the public health officer is primarily interested in its prevention.

Some counties maintain hospitals. These are primarily for the care of persons who cannot pay for hospital treatment. County hospitals have not become general, however. This probably is due in large part to the fact that the poor receive consideration at large numbers of private hospitals maintained by churches, by

private subscription, and other means. In addition, the cities support many municipal hospitals and the states maintain hospitals for special purposes, such as the care of the insane.

City health organizations are better planned and maintained than those of rural areas. A large city usually provides for a health department with a staff under the direction of an officer trained in public health matters.

The prevention or control of epidemics by vaccination, innoculation, and quarantine and by the eradication of the disease-carrying animals, are among the more spectacular activities of local departments of public health. A close cooperation exists between the local health bodies and those of the states and the federal government. Bubonic plague, the "black death" of the Middle Ages, has been brought under control by the foreign quarantines of the federal government, together with state and local activity in such matters as the destruction of the rats that act as carriers of the disease. Smallpox and typhoid fever are being brought under control in large part through vaccination and innoculation campaigns of local bodies. Compulsory vaccination of school children in the presence of an epidemic has been upheld in the courts (Jacobson v. Massachusetts). Public health authorities secure much of their support from the members of the medical profession who report cases of contagious diseases and assist in health campaigns.

One of the important functions of health authorities is their educational work. Instruction in methods of preventing the contraction and spread of disease, as well as in general matters of health, is carried on in the schools and through the press. In case of an epidemic, information is given out as to the best method of preventing contraction of the disease.

Much of the activity of the health department is carried on in cooperation with other departments. In many cities the health department sends to the schools visiting nurses and dentists who examine the children and recommend treatment in individual cases. Instruction in hygiene in the schools may also be carried on by the health department. It may cooperate with the engineering department in conducting tests and investigations in connection with the water supply and with sewage disposal.

State Authorities

Nearly every state has a board of health. Usually the members, or some of the members, must be physicians. In some states the medical association chooses the members or proposes a list from which the members are chosen, but most boards are appointed by the governor.

In every instance there is a state health officer. He may be chosen by the board or by the governor. He is a full-time official and heads the state department of health. The office enjoys the almost unique distinction of having everywhere nearly complete freedom from politics. Health officers, through a public comprehension of the need for professional competence in this field, are chosen on the basis of ability. Always they are physicians, and there is a growing recognition of the need for men who in addition are trained specifically in public health problems.

The health officer gives technical advice to the board and is its executive officer. While the authority of the boards varies in different states, it usually includes the power to make regulations affecting quarantines, sewage disposal, and water supplies.

The central authorities are coordinating agencies for the local boards and officers. They may be empowered to issue regulations binding upon state and local officials, as for instance requiring that sewage disposal plants meet certain specifications. some instances they have even the power to appoint or remove the local bodies. There is a tendency to secure a larger degree of control over local authorities through grants of funds which carry restrictions upon their use. In any case, the state authorities furnish information and provide facilities for united action in emergencies. Their activities relate to the control of communicable diseases through such measures as vaccination requirements and quarantines, the approval of water supplies and sewage disposal systems, instruction in health matters, and the compilation of statistics upon births, deaths, and communicable diseases as reported by physicians. Laboratories are maintained by them for the investigation of diseases and their cure, and frequently they furnish serums and vaccines to the local health bodies during epidemics. The licensing of physicians usually is in the hands of an independent examining board.

The effectiveness of the state health department is not so much dependent upon the law as upon the activity and initiative of the department itself. Its effective staff really includes the vast army of private physicians who voluntarily cooperate in measures for the eradication of disease. Perhaps no other field of governmental activity is so thoroughly permeated with a spirit of professional cooperation which goes beyond the need for statutory requirements. No other activity of the state involves so high a percentage of active workers who are governed by high professional standards.

The Federal Interest

Responsibility for the protection of the public health is primarily a function of the states rather than of the federal government. However, epidemics and disease are not respecters of political boundaries. Communication between the states has become so extensive that the central government has been compelled to assume a very considerable burden of duties in relation to health.

The Commerce Clause

The increasing density of population and the expanding interchange of commodities are related closely to the problem of public health, and it is not at all surprising that the commerce power of Congress has often been exercised with the national health in view. Laws passed in the exercise of this power may also aim at the furtherance of public morals or the prevention of fraud. A pure food law, for instance, may be intended to prevent fraud as well as to protect the public health; a white slave law may be designed to protect morals as well as suppress disease. Nothing illustrates better than this body of legislation the extent and variety of the ramifications of the commerce clause.

Sometimes it is suggested that the powers thus exercised by the federal government, along with some activities derived from other clauses of the Constitution, constitute a federal "police power." This is not strictly accurate. The "police power" is an inherent power exercised, according to the classic definition, for the protection of the "public health, safety and morals," to which perhaps should now be added the "public convenience," for the police power is now treated as practically the equivalent of the power to protect the public welfare. The federal government possesses no inherent powers, for its powers are all derived from specific grants. However, it does exercise, especially under the commerce clause, powers that have the same purpose as the police powers of the states and are analogous to them.

Where federal health regulations are applied to foreign commerce, they may be justified under the power to control foreign relations as well as under the commerce clause, and it is probably because of this fact that the federal government may go much farther in regulating this branch of commerce than it can in the case of merely interstate commerce. In regard to the control of foreign commerce, the Supreme Court, in the case of the Abby Dodge, referring to an act restricting the importation of sponges into the United States, has said that "so complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States." Similarly, the power to exclude aliens is complete.

The Power to Exclude

In purely domestic commerce the power of Congress is based upon the commerce clause alone. Congress, however, certainly has power even in domestic commerce to exclude articles which are harmful or inherently bad, or which are designed to be used for a purpose regarded as harmful or immoral. An example of the first would be diseased cattle, and of the second, lottery tickets. To this extent, the power of Congress to regulate carries with it the power to exclude.

Federal Acts

In a series of federal acts, Congressional control has been extended to a great variety of subjects touching directly or indirectly upon the public health. In 1884, diseased livestock was

excluded from interstate commerce, and this prohibition was later extended to foreign commerce. Even more drastic measures were provided for when the Secretary of Agriculture was authorized to prohibit the interstate shipment of any cattle from areas infested with disease. An order under this act applies to healthy as well as to diseased cattle. Meat is now inspected at the slaughterhouses and if found unfit, is destroyed. Impure food and drugs have been excluded from interstate commerce in an important series of acts. Viruses and serums must meet standards set by federal authorities before being transported across state lines. Federal authorities administer the interstate quarantine of human beings as well as regulations in regard to the transportation of persons afflicted with disease. Even plant life is protected by quarantine regulations to prevent the transportation of insect pests and plant diseases.

The Pure Food and Drugs Act

The best known of all these acts is the Pure Food and Drugs Act. For fifteen years before the passage of the Pure Food and Drugs Act of 1906, there had been agitation for Congressional legislation. Dr. Harvey Wıley of the Bureau of Chemistry was a leader in behalf of such legislation. The Association of State Food Control Officials, the American Medical Association, the National Wholesale Grocers' Association, the National Canners' Association, and some of the whisky manufacturers supported it. Much of the support came from those who wanted to remove dishonest competition from their own high-grade products. President Theodore Roosevelt came out in support of the movement. Among the opposing interests were whisky blenders, patent medicine companies, and manufacturers of cottonseed oil who were selling their goods as "olive oil," as well as some of the food manufacturers. Finally, in 1906, the measure was adopted. The act forbade the use in foods of poisonous or injurious substances, and this has been interpreted so as to forbid methods of canning that lead to the development of poisons. Medicines containing certain habit-forming drugs must carry the name of the drug, and food or medicines must have no 750 HEALTH

false statements as to the contents on the labels. The Food and Drug Administration (formerly the Bureau of Chemistry) in the Department of Agriculture enforces the act.

An adverse decision in the case of the United States v. Johnson held that the act did not cover a false or misleading statement as to the curative qualities of a medicine, and to correct this defect the Sherley Amendment of 1912, forbidding false statements as to the curative effect of medicines, was passed. The Net Weight Act of 1913, requiring a statement of the weight of the contents, is an amendment to the law designed to prevent a common variety of fraud.

Proposals to strengthen the Pure Food and Drugs Act have been under consideration. One of these is that the federal government be given authority to fix certain standards for different grades of articles, such as canned goods, and require a statement on the label of the grade into which the article falls. Thus, peas of a certain grade would need to meet certain standards as to size and quality. Such a law has even been suggested for such products as clothing, so that the label would show the percentage of wool, wearing qualities, insulating ability, and the like, as shown by scientific tests. However, the difficulties in the way of administering such requirements would be great. Manufacturers fear the effects of minute regulation and consider the plan impractical.

Advertising

It should be noted that the Pure Food and Drugs Act in its relation to false statements applies only to the package or label. It does not cover newspaper or magazine advertising, which sometimes have made claims for an article that could not be carried on the label. False claims in advertisements, however, may be reached to some extent through fraud orders of the Postmaster General, or more particularly through the activities of the Federal Trade Commission.

¹See pp. 171, 619.

²See p. 617.

Enforcement

The Pure Food and Drugs Act is enforced by the examination and analysis of samples taken after they have entered interstate commerce and if found in violation of law, the goods are confiscated or the dealers or manufacturers who shipped them are prosecuted through the Department of Justice Often the heaviest punishment comes indirectly through reduced sales.

Phosphorous Matches

A serious ailment was often contracted by workers in the manufacture of matches from certain forms of white or yellow phosphorus. The federal government has levied a tax of two cents upon each hundred of these matches with the purpose, not of gaining revenue, but of prohibiting the manufacture of matches from these forms of phosphorus. This is an excellent example of a tax for a regulatory purpose.³

Narcotics

The importation of all narcotic drugs except crude opium and coca leaves is prohibited. The Bureau of Narcotics in the Treasury Department determines the amounts of crude opium and coca leaves that are necessary for legitimate purposes, and importation is limited to these amounts. In addition, there is a federal tax on the sale of narcotics and a requirement of elaborate reports on each transaction so that illegal sales may be checked. This is another tax for a regulatory purpose.⁴

Meat Inspection

The Meat Inspection Act, a companion to the Pure Food and Drugs Act, is enforced in a different and more thorough way from the latter act, for it permits inspection and licensing of packing houses, and packers not so licensed may not ship in interstate commerce. Inspection at the source provides, of course, a more

⁸ See p 229

^{*} See p 229.

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thorough method of control than the inspection of samples after they have been shipped. Inspection at the source is not permissible under the Pure Food and Drugs Act.

Child Labor

A notable aftempt to regulate health and morals through the commerce power was declared invalid in the first child labor case (Hammer v. Dagenhart).⁵ In a five-to-four decision, the Supreme Court held that the act, prohibiting the interstate shipment of the products of factories that employed children below certain ages, was really a police regulation and a regulation of local manufacture and hence was not within the jurisdiction of the federal government. The court distinguished this from other cases upholding a federal power of prohibition, pointing out that the present act dealt with commodities not harmful in themselves. An article made by a child at a machine is not different from one made by a machine controlled by an adult and is not in itself harmful.

Subsequently Congress attempted to regulate the same subject by levying a ten per cent tax on the net profits of mines and factories employing children below certain ages. This was held to be not a tax but a penalty for failure to observe a regulation upon a matter over which Congress had no jurisdiction. Since Congress had no jurisdiction over manufacturing in the states, the act was, of course, unconstitutional (Bailey v. Drexel Furniture Co.).⁶

An attempt to regulate child labor under the codes of fair competition of the National Recovery Administration fell along with the collapse of the whole code structure.

Subsequent attempts to secure the adoption of a Constitutional amendment prohibiting child labor have not been successful. However, the Fair Labor Standards Act of 1938 prohibits the interstate shipment of goods from establishments employing "oppressive child labor."

⁵ See p 564.

⁶ See p 230.

⁷ See pp 623, 624.

It is interesting to note that lottery tickets, as things capable of being used for a purpose injurious to morals, and advertisements for lotteries have been excluded from interstate commerce. Congress first prohibited the use of the mails for the transmission of lottery advertisements and was upheld by the courts on the ground that the federal government need not lend its facilities for an immoral purpose (In re Rapier; Ex parte Jackson). Then the lotteries began to ship their tickets by express. Congress prohibited this and the act was upheld in Champion v. Ames as incident to the commerce power. Presumably, lottery tickets are inherently bad, but the products of child labor are not. A lottery ticket is useful only in accomplishing the end of the lottery, but the products of child labor have uses entirely independent of the forces that brought them into being.

White Slave Act

The White Slave Act, prohibiting the transportation in interstate and foreign commerce of women for immoral purposes, has been upheld (Hoke v. United States) and falls in the same class of cases as Champion v. Ames. Another act, providing penalties for engaging in this traffic in connection with immigrant women, and applying for a period of three years after such women had entered the country, was held invalid on the ground that it was an attempt to extend the jurisdiction of the federal government beyond the limits of its powers over immigration (Keller v. United States).

Other Examples of Exclusion From Interstate Commerce

In 1912, prize-fight films were barred from interstate and foreign commerce, and in so far at least as it affects foreign commerce, the act has been upheld (Weber v. Freed). Apparently prize-fight films also are inherently bad.

The interstate transportation of indecent literature or pictures is forbidden, as is the dissemination of articles in connection with the prevention of childbirth or information concerning the obtaining of such articles.

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Liquor Legislation

The history of federal liquor legislation prior to the Eighteenth Amendment reveals "dry" states in a difficult situation. While liquor could not be manufactured in a "dry" state, the distillers in "wet" states shipped their products to dealers in the "dry" states, who were immune from the state law until the goods were resold or the original package was broken (Leisy v. Hardin). Congress intervened with the Wilson Act of 1890, permitting the application of the state law to liquor "upon arrival in such State or Territory," but this was interpreted to mean, not that the state law applied when the goods arrived across the state line, but only after the goods had reached the consignee, who thus could use, although he could not sell, the goods (Rhodes v. Iowa). The Webb-Kenyon Act of 1913 prohibited such direct shipments into "dry" states for personal or other use in violation of state law and was upheld in the Supreme Court (Clark Distilling Co. v. Western Maryland Railway Co.).

Subsequently, the Eighteenth Amendment prohibited the manufacture, sale, or transportation of intoxicating liquors for beverage purposes. Congress and the states were given concurrent jurisdiction to enforce the amendment. Under this authorization Congress passed the Volstead Act as the federal enforcement measure. In many localities, however, state enforcement broke down, and difficulties in carrying out the law were experienced even where honest efforts at enforcement were made. A persistent lobby fought for repeal, and eventually the Twenty-First Amendment, repealing the Eighteenth Amendment, was adopted. This amendment, however, prohibits the transportation or importation into a state of intoxicating liquors in violation of the laws thereof. This latter provision seems hardly to have been necessary in view of the decision upon the Webb-Kenyon Act, but probably was added as an innocuous sop to "dry" sentiment.

Quarantine

One important power possessed by the federal government in the protection of health is in relation to quarantine. Federal HEALTH

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quarantine powers in general find a legal basis in the commerce clause. However, national quarantine regulations at the seaports affecting ships and their passengers and cargoes may be justified under the power to control foreign relations. As a matter of fact, the federal government now has absorbed the whole field of maritime quarantine. This has been done with the assent of the states, which were glad to have their maritime quarantine stations taken over. Local quarantine is, of course, primarily a matter of state concern. However, federal powers in relation to interstate commerce may be used in cooperation with state quarantines.

Another phase of the health activities of the United States is in relation to animal quarantines, administered by the Bureau of Animal Industry in the Department of Agriculture. This bureau has charge of the administration of the laws prohibiting the importation of diseased livestock into the United States or into one state from another. It also controls the interstate shipment of meats unfit for consumption. The Bureau of Animal Industry, the Bureau of Dairy Industry, also in the Department of Agriculture, and the Public Health Service cooperate with the states in measures designed to maintain the health of dairy cattle and to prohibit the interstate shipment of milk unfit for consumption.

The quarantine powers of the United States are not limited to human and animal quarantines. The third important phase of federal quarantine, administered by the Bureau of Entomology and Plant Quarantine, relates to plants. This type of quarantine, however, is not concerned with health, but is economic in nature, since it is designed to protect plant life from destruction by diseases and insect pests.

Research

The Public Health Service, in the Treasury Department, which administers the human quarantine laws of the United States, also carries on investigations into the causes of diseases and cooperates with the states in matters of health. This research work can be upheld under the general powers of the federal government to appropriate money, and possibly as incidental to its quarantine powers.

Grants to the States

The Social Security Act ⁸ makes grants to the states in aid of public health work, and the funds for this purpose are controlled by the Public Health Service. This same act makes grants for the care of crippled children and for maternity and infancy service. These grants are controlled by the Children's Bureau.

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^{*}See p. 676.

CHAPTER XXXIX

Crime

The Increase in Crime

The increase in crime since the World War has created a serious national problem. Murders are being committed at an estimated rate of between eight and ten thousand a year. This means about one murder for each hour of the day. The percentage of murders to population is around nine times as great in this country as in England. Robberies and various other forms of crime likewise have increased in alarming numbers. The annual cost of crime in the United States is variously estimated at from eleven to eighteen billion dollars a year.

New Forms of Crime

Not only has there been an increase in the number of crimes but new aspects have developed. Crime, like business, has turned to combinations and large-scale operations. Criminals are organized into gangs. They have plentiful capital, use expensive, high-powered cars, and are supplied with the best of weapons. Their plans are carefully laid and are carried out by men to whom crime is a profession. New forms of crime have been discovered, or rather, old forms have been developed to larger proportions. The "racket" or levy of tribute upon legitimate business, usually under the guise of a charge for "protection," has reached the proportions of a major industry. Such "rackets" often are operated under the outward forms of legitimate business. An association may be incorporated under state law with a president and other officers. These officers will approach establishments in a certain industry with a proposal that they enter into the association, which offers to protect them from labor troubles. A fee is to be charged for this service. Owners

who do not care to become members of the association find their stocks destroyed by acids, their buildings bombed, and their delivery wagons interfered with. It appears to be cheaper to pay tribute to the racketeers than to suffer these losses.

Organized crime received a great impetus under the Eighteenth Amendment when large numbers of people were purchasing liquor produced and distributed by the criminal element. In effect there was an alliance between crime and society or a part of it, in defiance of political authority. The large profits to be derived from illegal traffic in liquor led to strife between rival gangs and provided them with the sinews of war. Racketeering is similar to the traffic in illegal liquor in that it requires gang organization to be carried out successfully. A considerable degree of specialization appears in the execution of crimes. The men who lay the plans perhaps have nothing to do with their execution; the gunmen who murder a gangster may be only hired assassins of a rival; the men who perform a kidnaping may leave to others the passing of the bills secured from the relatives of the victims. The various persons engaged in carrying out a single crime sometimes are scattered over several states. The Urschel kidnaping took place in Oklahoma, the demand for ransom was made from Joplin, Missouri, the money was paid in Kansas City, and some of it was passed in Minnesota. Urschel himself had been carried by the kidnapers to Texas.

Obviously, organized crime constitutes only a part of the total crime of the country. However, in proportion to the number of persons involved, its depredations on society are the greatest. Since it is organized crime that is most likely to form alliances with politicians, it presents a governmental problem beyond the ordinary difficulties involved in apprehending and convicting criminals.

The Causes of Crime

Many theories have been put forward as to the causes of crime. Attempt has been made to show that there are distinct criminal types. The shape of the head or the structure of the body have been said to determine whether the individual is destined to be a criminal or a law-abiding member of society. Modern students

reject the idea that there are criminal "types." They stress instead the idea that anyone, under the wrong kind of environment in childhood, might develop into a criminal. It is recognized, however, that one may inherit a deficiency in mental equipment that bespeaks a lack of moral responsibility and that diseased and disordered minds may be conducive to criminal acts. The study of crime now is carried on primarily from the social point of view.

It is generally conceded that criminals are made in their youth. Probably three fifths of the inmates of prisons are under thirty. The largest group probably are around the age of nineteen or twenty, and a considerable proportion are even younger. The average age of criminals is believed to be somewhere between twenty and twenty-five. These young men are the "hardened" criminals of today.

Some of the forces that produce criminals are believed to be subject to control. The spirit of adventure that leads one boy into an ambitious career as an honorable member of society may, when misdirected, lead another into criminal activity. If his natural instinct for action does not find an outlet in lawful ways, vicious habits may develop. Minor violations of law often are treated by society in such a way as to establish in the plastic mind of a child offender the belief that he is an enemy of the social order. He shapes his actions accordingly.

Students of crime are agreed upon the influence of poor home conditions. A very high percentage of delinquent children are from broken homes. Such children have been denied the advantages of a normal family life. They have not developed orderly home habits and have not been subject to the balancing influences of both parents. Then, too, parents who are not able to live together may frequently be temperamentally unfitted to bring up children. Whatever the exact causes may be, we know that broken homes are productive of delinquent children.

Homes in which there is emotional conflict between the parents or between parents and children may be equally productive of delinquency. Children who are subjected to real or fancied parental injustice may come to regard all authority as oppressive. Extreme poverty is not conducive to a peaceful home life and

may lead to delinquency. Parents are often so occupied with securing the essentials of existence that they do not have adequate time to devote to the development of the characters of their children.

While the perils of the crossroads may not have received all the publicity they deserve, we do know that in the cities, in those congested, poverty-stricken areas known as slums, there is produced a high percentage of the criminal population. The children are undernourished, and their surroundings are ugly and dirty. Their playmates are the promiscuous and haphazard contacts of the streets.

Criminal tendencies develop especially among men who have no fixed vocational anchorage. The man with a trade is not likely to become a criminal. In fact, only a very small percentage of our prison population is made up of members of skilled trades. A high percentage consists of persons who were out of work at the time they committed the crimes leading to their arrest. Allied to vocational unfitness is poor education. Only a small proportion of the inmates of prisons (in New York around twelve per cent) are grammar school graduates. For the most part, criminals come from the lowest economic stratum in society, the unskilled, poorly educated young men and women who have not found a vocation that assures them a living and a place in the community in which they can take a degree of pride.

Crime may also be fostered by the belief that criminal acts are not inherently different from other acts tolerated by society. Our individualistic economic system has produced fierce competition, and corporations and individuals sometimes have been ruthless in the use of competitive practices.

The racketeer who extracts "protection" money from the milkman may regard this as a business practice differing from the methods of legitimate business in only one respect—that it is not sanctioned and protected by law. He does not see in the practice itself a basic moral difference.

Probably, forms of crime other than organized racketeering grow out of a similar philosophy. Our economic system does not serve equally well for all A man may believe that outside that system his opportunities are more nearly equalized. He

may not do this from a conscious philosophy, but he is not held up by the buoyant hope of the man who sees a future ahead of him in the existing society. Ill equipped for the competitive struggle under the order recognized by law, he turns to a career of crime.

A belief that our judicial system does not provide equal justice for all also has tended to break down respect for law. There is a prevalent opinion that wealthy men escape the penalty of their crimes through weaknesses in our system of trial. This encourages the belief that crimes may be committed with impunity provided there are sufficient funds available for legal defense.

It is an interesting fact that among the causes of crime our system of punishment is frequently cited as a potent influence. In our prisons, first offenders are often herded with hardened criminals. Even the most stable characters would not profit from such associations, and yet young men in the early stages of criminal life are sent to these postgraduate institutions of criminal instruction in the hope that they will come out better citizens. Much has been done to improve this situation by means of probation, parole, the reform of prison administration, and improvement of the physical arrangements within prisons, but much yet remains to be done. So far as possible, punishment should aim at reform. Certainly it should not be permitted to develop into a system for the incubation of criminal tendencies and the development of criminal techniques.

The Jury

One of the weakest links in our system of justice is the jury. There are few students of our courts who would abolish the jury entirely, but there are many who believe that in its present form it is not adapted to meet the problems of today. The grand jury is being supplanted in some states by the district attorney as the accusing organ. In such states "informations" of the district attorney may be substituted for the indictment of the grand jury. It is upon the trial jury, however, that most of the criticism falls. The method of selecting the members, the number required for a verdict, and the relation of the jury to the judge have been

focal points for this criticism. The chance method of drawing names of jurors from a list of taxpayers may bring the most unsuitable persons into the jury box. While taxpayers may as a whole constitute the more substantial element in the community. the mere inclusion of a man's name in the list of taxpayers is by no means a guarantee either of his intelligence or his honesty. Where it is possible for men to loiter around courtrooms and merely by coming within range of the official eye secure inclusion in the list of jurors, an even more questionable type of citizenry may be brought in. The peremptory challenges and challenges for cause by counsel should be a method of partially weeding out undesirable material, but since both stupidity and dishonesty may be desirable attributes from the point of view of the counsel for a guilty crook, these challenges may merely constitute a further assurance that the jury will consist of inferior men. The unwillingness of many substantial citizens to serve further contributes to the low caliber of our juries. Considering all this, it is surprising that juries are no worse than they are and that miscarriages of justice are no more common. There is nothing that would contribute more to the proper carrying out of justice than an improvement in the machinery for the selection of jurymen. Some experimentation is now being made with "blue ribbon," or carefully selected, juries.

The unanimous verdict now usually required in criminal cases is intended as a protection for the accused. A man is presumed to be innocent until proved guilty, and guilt must be so clear as to leave no reasonable doubt. That twelve men must be unanimous in their conviction of guilt before sentence can be pronounced is evidence of this desire to protect the innocent from unjust punishment. With juries chosen as they are, however, the requirement of a unanimous verdict adds another weapon to the arsenal of the criminal and his sometimes equally guilty lawyer, who need only one corrupt juryman to create a "hung" jury, with the consequent delay attendant upon a new trial. Delays always work to the advantage of the guilty, for eventually witnesses die or leave the jurisdiction of the court, new district attorneys come into office, the docket becomes crowded with new cases, and the prosecution is dropped. Even though there

is a new trial, juries are reluctant to find guilt after an interval of time has elapsed. Some states have reduced the size of juries for the less serious offenses, thus making it easier to secure agreement. The solution of the problem may lie in this direction, or the jury may be retained at twelve but with a less than unanimous verdict. However, with an improvement in the type of juryman perhaps there would be no need for a drastic departure from the traditional jury system.

An improvement in the relations between the judge and the jury might well be effected. The British courts have brought about such a change. The element of the professional judge, experienced in the methods of the courtroom and accustomed to the weighing of evidence, is blended with the element of the jury of laymen with a nonprofessional point of view. This is effected by permitting the judge to take a greater part in the proceedings.

The Police Department

"Politics" and corruption in official places offer encouragement to criminal activity. An alliance between criminals and dishonest elements within a police department will permit gambling and racketeering to go on unmolested while the general public is not aware of the situation. An honest and efficient police department is the first requisite in the control of crime. Too often our police heads are changed with each incoming political administration. It is impossible for the best of men to carry out a consistent policy without a reasonable expectation of permanence in office. It requires time to become acquainted with the peculiar problems of the particular city, to learn the points of strength and weakness of subordinate officers, and to build up a proper esprit de corps among the patrolmen and other members of the force who come into direct contact with criminals. Moreover, the politically appointed Superintendent of Police is likely to be a politician himself. He looks to the political heads of the city for guidance and if those heads are acting in collusion with criminals, he will not find it profitable to carry out his duties too conscientiously. Moreover, the politically minded Superintendent will carry politics into his department and will

be influenced by it in the choice of his chief subordinates. The true superiors of these subordinates are the politicians who secured their appointment, rather than the Superintendent. Discipline is weakened, merit cannot be rewarded by promotion within the force, and morale is destroyed. Permanent, professional, nonpolitical police heads are essential to the enforcement of law.

The local peace officers not only enforce the local ordinances but also are the representatives of the state in the enforcement, locally, of criminal laws of the state. Despite this fact our local areas are left practically free in the control of their sheriffs and police officers. This American practice of leaving the enforcement of general laws to the localities is in contrast with the methods of such countries as France, where the central authorities retain a direct supervision of local police, or England, where the system of grants-in-aid provides indirectly a considerable degree of central supervision. It is true that some of our states are developing state police forces, but their activities are merely supplementary to those of the local bodies.

There has been much improvement in the last two decades in the methods of recruiting police. Political influence does not play so large a part as it did in the past. The police forces now have minimum physical standards, and appointment is dependent upon passing an educational test. Admission to the force of a large city is followed by instruction in the duties of an officer and in elementary legal matters necessary to intelligent law enforcement as well as by training in the physical aspects of the work. Special details of men are instructed in fingerprinting, machine gun use, and the like. It is customary to promote privates from patrol work to special branches, such as detective work. This encourages a high morale in the force, since it increases the opportunities for the promotion of good men, although better qualified men for fingerprint identification or detective work might often be drawn from the outside.

An effective police department needs the best and most modern equipment. The modern criminal in a high-speed car, armed with machine guns and sawed-off shotguns, too often is followed by police officers who are comparatively unarmed. For the de-

tection of crime a modern police department in a large city needs fingerprint experts, chemists, trained detectives, and other men specialized in various branches of criminal detection. An expert coroner, competent in performing autopsies, is too often lacking, especially in rural areas.

The District Attorney

Even the most efficient police department, however, will be helpless if the district attorney is incompetent. Here again there enters the political element, for the district attorney is an elected official, dependent upon politics for re-election. Since grand juries usually depend upon the district attorney to take the initial step, prosecutions are not likely to be brought if he is inactive. Even though indictments are brought, the district attorney retains control through his power to "nolle pross," to compromise, or to fail in vigorous prosecution.

The Judge

Finally, politics enters into the enforcement of criminal laws through the fact that judges generally are elected. While the universal respect for the courts above all other organs of government in this country has maintained a remarkably high level among the judiciary, despite the method of choice, nevertheless, the injection of a political element into the judicial system cannot contribute to its best interests. Courageous and vigorous judges, free from political influence, are essential in the control of crime.

The Lawyers

A lawyer is an officer of the court before which he is admitted to practice. Yet there are lawyers who depend for a livelihood upon their professional associations with criminals. Of course, an accused man is entitled to counsel, but he is not entitled to the use of unethical means in securing his release. Such lawyers are not likely to limit their activities to seeing that orderly and fair justice is administered. Moreover, much of their value to the criminal lies in the advice that they can give upon the best

methods to be followed to accomplish nefarious ends with the least technical violation of the law. Some kinds of crime, such as racketeering, are particularly dependent upon the advice of this type of counsel.

The Witnesses

In the prosecution of members of gangs, one of the most difficult problems arises in connection with witnesses. Fear of retaliation retards even victims of criminal activities from disclosing their information to officers, and after they have been subpoenaed to appear, key witnesses may flee from the jurisdiction of the court and disappear. Without witnesses, the prosecution falls.

Fingerprinting

A proposed measure in the control of crime that has received much discussion is universal fingerprinting. It is believed that the fingerprints of no two individuals are exactly alike. At the same time experts are able to classify them in such a way that it is easy to locate any individual set of fingerprints among thousands in a file by mere reference to a copy. A central bureau containing the fingerprints of every person in the country would have great value for purposes of identification. Criminals are likely to become "repeaters," and such identification would aid in crime detection. Where fingerprints have been left upon the scene of a crime, it would have great value. Another use for such a file would be the identification of dead bodies and of persons who have forgotten their own identities. A file of this nature is objected to on the ground that it would invade the personal liberty of the individual and would smack of regimentation if it were made universal and compulsory. Its practical value, however, is beyond question.

Some approach toward a national file of this sort is now being made in the Bureau of Investigation of the Department of Justice. Police departments from all over the country send to this bureau copies of fingerprints of criminals apprehended by them. This is not compulsory, of course, but is actually done on a very large scale. In return the Bureau of Investigation

will make identifications from its files of fingerprints sent in by police departments. The nucleus of a national crime bureau is thus being established on the basis of voluntary cooperation between the local departments and the national government. This bureau also maintains a separate civil identification file containing the fingerprints of such persons as may desire to have them recorded for possible use later.

Interstate Rendition

Our dual system of government, under which state lines have something of the nature of national frontiers, contributes somewhat to the problem of crime. An escaping criminal fleeing into another state can be returned to the state in which the crime was committed only by a process similar to international extradition. The preparation of rendition papers is complicated, requiring a certified copy of the warrant for arrest, certification that the judge signing the warrant is the person he claims to be, certification by the appropriate officials that the judge is properly appointed or elected, certification of the name of the prosecutor and certification that he is properly elected, and the signature of the governor and the seal of the state. Each of the steps in this process may require action by a different official. Then there is a hearing before the governor of the state into which the fugitive has gone, at which he appears in person or is represented by counsel. The governor may make the proceedings very formal, giving them something of the dignity of a court trial and insisting upon the production of convincing evidence of the crime In the end he may release the fugitive upon frivolous grounds or no grounds at all. Of course, where a federal crime has been committed, the federal officers may arrest the fugitive anywhere in the United States, since the jurisdiction of the federal government is not limited by state lines.

Federal Legislation

In recent years the federal government has been making use of its commerce powers to aid the states in the solution of crimes

¹ See p 298

that in themselves have no interstate character. Some crimes, such as kidnapings, may involve activities in several states. One of the most important of the laws passed under such powers was the National Motor Vehicle Theft Act of 1919, laying heavy penalties upon the transportation of stolen automobiles in interstate or foreign-commerce. This act made the offense punishable in any district in or through which the vehicle was transported and also prohibited the receiving, or disposing, of such automobiles.

In 1934 a number of acts of a similar nature were passed. Threats for purposes of extortion when sent across state lines were made criminal under the federal commerce power. The federal kidnaping law was strengthened, and it was provided that failure to release a kidnaped person should create a presumption (not to be conclusive) that he had been transported in interstate or foreign commerce. The most far-reaching of these laws prohibits any person from crossing state lines to escape punishment for committing, or attempting to commit, murder, kidnaping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, and in addition prohibits the crossing of state lines to avoid giving testimony in cases of felony of any sort. This act makes it possible for federal officials to apprehend criminals who have committed a crime in one state and escaped into another. They may then be returned to the state in which the crime was committed without need of rendition papers and turned over to the state authorities for trial. Previously it had been difficult for the federal authorities to secure jurisdiction even to aid in the solution of any such crimes unless a stolen automobile had been used in violation of the law referred to above. Under the present law, the mere crossing of a state line is sufficient to give jurisdiction. The purpose of the act apparently is not so much to bring about federal prosecution for violations of the act as to facilitate federal cooperation with the states and to provide a substitute for the formal interstate rendition procedure. In addition, the old problem of the witness who flees the jurisdiction of the state court has been brought under control by this law. It represents one of the most extreme of the extensions of the commerce clause

of the Constitution. Another act makes it a federal crime to rob a bank which is a member of the Federal Reserve System or which is organized or operating under federal law. The penalties in this act are graduated so as to provide the most severe punishment when, in committing the robbery or in attempting escape, any person is killed or carried away. Somewhat lower penalties are provided where there is merely assault or life is jeopardized by the use of dangerous weapons, and still lower penalties are provided when these elements are absent. Other acts provide punishment for the killing of federal officers or for impeding them in the exercise of their duties and provide penalties for aiding in riots in federal penal or correctional institutions, for assisting in escapes from these institutions, or for furnishing firearms or tools that might be used in escaping. These six acts all became law on the same day, May 18, 1934. They are expected to be of considerable assistance in facilitating aid to the states in the solution of major crimes.

A few days subsequent to the going into effect of these laws Congress gave its approval in advance to any agreements or compacts that might be entered into between two or more states for cooperative effort in the prevention of crime and enforcement of their criminal laws, and to the establishment of agencies, joint or otherwise, for making such laws effective. This law should facilitate the simplification of rendition proceedings and presumably would even permit the establishment of a joint police force by two or more states.

This was followed a few days later by an act which made it a felony to obtain money or property by coercion or threat "in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move" in interstate commerce. This act assumes federal jurisdiction over racketeering in interstate commerce, and since there is little commerce that does not "in any degree" affect interstate commerce, it gives, if constitutional, jurisdiction to federal authorities over nearly all forms of racketeering Its broad terms extend federal jurisdiction over a very large field of crime previously considered exclusively within the sphere of action of state authorities.

The National Firearms Act was signed a few days later. This law obviously was modeled upon the Narcotics Act.2 Applying to machine guns and shotguns and rifles with barrels of less than eighteen inches and similar weapons, except pistols and revolvers, the act provides for licenses and special taxes for manufacturers and dealers, who must keep records and make reports of transactions.' A tax of \$200 is laid upon each such firearm sold and records must be kept of sales, including fingerprints and photographs of individual purchasers. It depends primarily upon the taxing power of Congress for its jurisdiction. In June, 1038. the Federal Firearms Act prohibited the interstate shipment of all kinds of firearms, except by dealers licensed by the Secretary of the Treasury. Shipments to persons convicted of crimes of violence, or under indictment for such crimes, or to fugitives from justice, were prohibited, and other regulations designed to prevent evasion of the purposes of the act were provided. This act is based upon the commerce clause.

The Theory of Punishment

The older theory upon which punishment was justified was that a criminal act as a matter of logical sequence called for a punishment. The criminal simply "had it coming to him." The punishment should be proportional to the crime simply because the seriousness of the crime called for a balancing retribution—an eye for an eye, a tooth for a tooth. This theory is not based upon the idea of the protection of society or the improvement of the criminal. The wrongful act in itself calls for a proportionate punishment. It is difficult to provide a logical basis for this theory, and yet there are few of us who do not hold to it in some degree. When we read of some particularly atrocious crime—the murder of a child by an adult man, the torture of an innocent person in cold blood—there are few of us who do not feel instructively that the perpetrator should himself be made to experience pain merely because he has been guilty of the callous act. It seems to be related to essential justice that reward and

² See p. 229.

punishment should be granted in accordance with the nature of the good or evil in the act performed.

The newer theories of crime reject this philosophy as a relic of barbarism, not justifiable on any rational basis. Punishment would be related to the future rather than to the past. Probably all would unite in saying that punishment is justifiable for the protection of society. Removal of the criminal from society prevents him from continuing his depredations upon it for so long a period as he is thus removed. Most punishments, however, do not involve death or life imprisonment. The limited penal terms for lesser crimes are justified either because anticipation of detection will act as a deterrent to crime or because the memory of a former punishment will tend to prevent repetition. Just to what extent criminals are inclined to count the cost before committing a criminal act is a question for debate. Some crimes of violence undoubtedly are committed without any consideration of the price to be paid. It is quite likely, too, that criminals are optimistic about escape from punishment, their minds being absorbed in evolving the means of escape rather than in contemplating the punishment. However, it is likely that much crime would be prevented by fear of punishment if conviction were reasonably certain.

Another justification for punishment lies in the possibility of reforming the criminal. Many criminals belong to the class of the economically unfit. Given a trade and a new viewpoint on life, they may return from prison prepared to live orderly and peaceful existences. Since so large a part are young men, they should be susceptible to reform. Punishment in such case loses the true character of punishment and simply becomes a part of a plan of rehabilitation.

Whether the punishment is justified as removing the criminal for a greater or less period from the opportunity to commit further crimes, or as creating a fear of future punishment, or as offering a means of reform, the justification can be found in the need of society to protect itself. The success or failure of any system of dealing with criminals can be judged by its effectiveness in affording this protection, that is, in reducing the amount of crime.

As a result of the newer theories of crime, a number of changes have been brought about in our methods of dealing with criminals.

Probation

The first of these changes is the system of probation. Probation is intended primarily for first offenders. These are usually young people whose habits of crime have not become fixed and who, therefore, may be amenable to reform. Probation is no measure for hardened criminals. In any case, it should be used judiciously and with the proper administrative machinery. Properly administered, it is regarded as a distinct improvement upon incarceration. To place a young first offender in prison where he will necessarily come into contact with hardened criminals is an almost certain guaranty that he will come out more fixed in his criminal attitude, more likely to continue his criminal career. The offender on probation is placed under the charge of a probation officer. Under the supervision of the probation officer he returns to normal life in society, subject only to the necessity of reporting to this official and acting under his supervision. In addition to offering opportunities for reform, the system is regarded as economical, since the criminal returns to productive life in society, where he may often be able to make restitution for his acts and pay off his fine, meanwhile relieving the state of the necessity for providing his upkeep.

The key to a successful probation system is a competent probation officer. He should be a trained social worker, capable by temperament and education to deal with delinquents, who can make himself a friend to his charges without becoming sentimental or soft. His duties begin before the judge has pronounced sentence, for he investigates the case for the court and the court leans upon his advice in reaching judgment. If the delinquent is placed on probation, he acts as his supervisor until the probation period is closed. In cases in which the offender violates his probation the record kept by the officer and his recommendations for treatment accompany the delinquent to prison or the reformatory, and if a subsequent parole is granted, the paroled offender is returned to his supervision.

Where the probation officers are properly trained and selected and are provided in sufficient numbers, and where the administrative machinery is worked out properly, the system leads to good results. With politically appointed probation officers it easily becomes a means by which criminals are protected from punishment.

Parole

Probation is a substitute for incarceration. Parole, by contrast, is the conditional release of a prisoner before his term has expired, returning him for the remainder of the term to life in normal society under the supervision of a probation officer. It differs from probation in the fact that a period is first spent in an institution. A parole board investigates the cases and where it is deemed best, prisoners are paroled before the full term has expired. Since probation is used only for minor offenses and usually only with first offenders, parole comes to be applied to the more serious cases. An unfortunately large proportion of prisoners under parole are guilty of further crime. It does not follow that the system of parole should be abandoned, but it is evident that adequate safeguards have not been set up. Parole boards should consist of men and women who have been trained for such work. If politicians are permitted to dominate such boards, parole is likely to become merely the "back door to the jail." The system of supervision for paroled prisoners needs to be strengthened. With the proper administrative machinery, however, parole can be made a powerful force in the rehabilitation of prisoners. The parole of habitual criminals, the repeaters who show no aptitude for reform, is an evidence of administrative weakness, of political influence, or of undue sentimentality.

On the other hand, parole is regarded by students of crime as an excellent method of treatment in some cases. It provides a transition period between prison and complete freedom and is a test of the paroled man's capacity for a law-abiding life. It need not necessarily involve shorter periods in prison. Instead, the court may impose maximum sentences which may be subject to conversion by parole in lieu of the shorter sentence that nor-

mally would be imposed. In this way, parole may become a part of a new system of punishment and treatment.

Child Delinquency

Child delinquency is coming to be regarded as calling for special administrative machinery. Nearly every state has provision for children's courts or domestic relations courts. Probation is a common method of treatment in these courts. The state of Virginia has gone so far as to provide that no children's court may commit to an institution. Instead, the commitment is from the court to the state children's bureau, which may send the child to an institution or a home as it thinks best in each case.

Prison Administration

A further reform in our system of dealing with crime is in the administration of our prisons. In the past all types of criminals have been herded together in crowded prisons. Internal administration has been unsympathetic. Often the prisoners have been subjected to long hours of idleness with consequent deterioration of character. Much improvement has been brought about in our prison administration, but much remains to be done.

Local jails maintained by the counties are even worse than the state prisons. The county has too few prisoners to provide a proper system of care. Since counties often delegate to the sheriff the feeding of prisoners, paying the officer a fixed amount for each inmate, there is temptation to skimp on the food in order to make a larger profit. The usual criticism of prisons applies to jails in an even larger degree.

The crowded prison in which all kinds of criminals are kept together is a postgraduate institution in the art of crime. Here, at public expense, the first offender develops his criminal tastes, establishes the "contacts" so often considered valuable in collegiate life, and acquires further knowledge in the technique of his profession. However, the true cost to society is not realized until he emerges from prison, not as the delinquent who has drifted into wrong channels, but as a hardened criminal to whom crime is a career. Students of crime have concluded that the more

nearly individualized the treatment of delinquents is made, the more successful it is likely to be in directing them back into a normal life in society. No doubt there is a large class of criminals upon whom measures of reform would be wasted. There is another class, however, who will respond to proper measures. Beyond its worth as an investment in human values, provision for the most scientific treatment of delinquents is an economy if it reduces the appalling cost of criminal depredations upon society.

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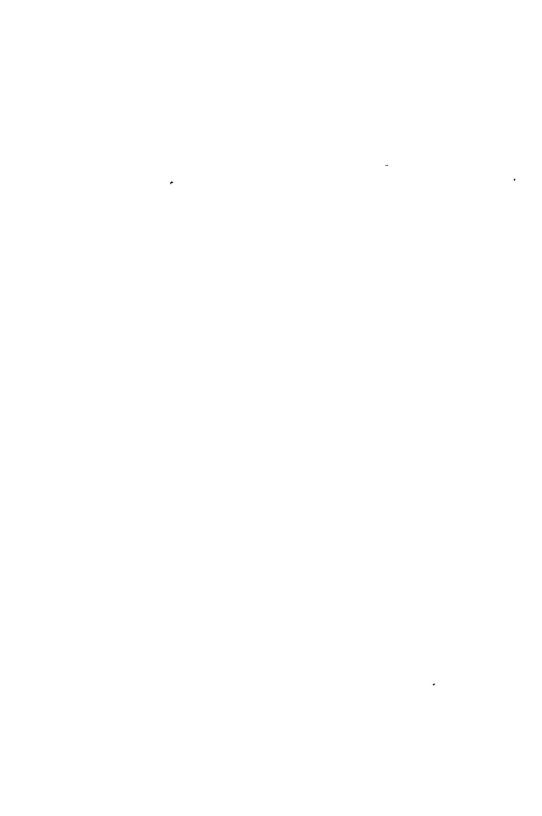
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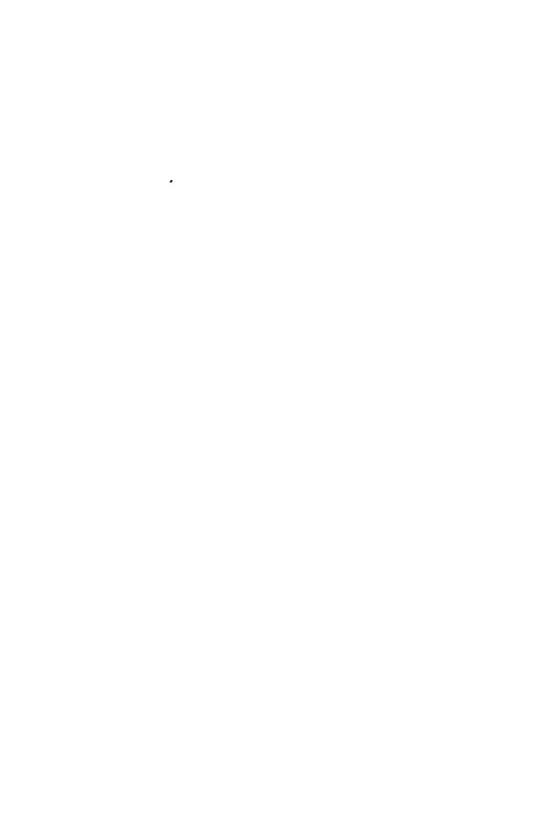
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APPENDIX CONSTITUTION OF THE UNITED STATES



APPENDIX

Constitution of the United States¹

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives

Section 2. (1) The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

- (2) No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
- (3) Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, [which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons.]² The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative, and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

¹ The numerals in parentheses have been added by the editor.

²⁻See Amendment XVI.

- (4) When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.
- (5) The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment
- Section 3. (1) The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,]³ for six Years, and each Senator shall have one Vote.
- (2) Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies]⁴
- (3) No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.
- (4) The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.
- (5) The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.
- (6) The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.
- (7) Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.
- Section 4. (1) The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.
 - (2) The Congress shall assemble at least once in every Year, [and such

³ Changed by Amendment XVII

Changed by Amendment XVII.

Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day $]^5$

- Section 5 (1) Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business, but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide
- (2) Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.
- (3) Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one-fifth of those Present, be entered on the Journal.
- (4) Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting
- SECTION 6 (1) The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same, and for any Speech or Debate in either House, they shall not be questioned in any other Place
- (2) No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time, and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office
- Section 7 (1) All Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with Amendments as on other Bills.
- (2) Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States, If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other

⁵ Changed by Amendment XX.

House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a law.

- (3) Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.
- Section 8. (1) The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and Provide for the common Defence and general Welfare of the United States, but all Duties, Imposts and Excises shall be uniform throughout the United States,
 - (2) To borrow Money on the credit of the United States;
- (3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,
- (4) To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
- (5) To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures,
- (6) To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
 - (7) To establish Post Offices and post Roads;
- (8) To promote the Progress of Science and useful Arts, by securing for limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,
 - (9) To constitute Tribunals inferior to the supreme Court,
- (10) To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,
- (11) To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- (12) To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
 - (13) To provide and maintain a Navy;
- (14) To make Rules for the Government and Regulation of the land and naval Forces;
- (15) To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

- (16) To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
- (17) To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; —And
- (18) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
- Section 9 (1) The Migration or Importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each person.
- (2) The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
 - (3) No Bill of Attainder or ex post facto Law shall be passed.
- (4) No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken ⁶
 - (5) No Tax or Duty shall be laid on Articles exported from any State.
- (6) No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.
- (7) No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law, and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.
- (8) No Title of Nobility shall be granted by the United States And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.
- Section 10 (1) No State shall enter into any Treaty, Alliance, or Confederation, grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment

⁸ See supra, note 2.

of Debts; pass any Bill of Attainder; ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

- (2) No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.
- (3) No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

- SECTION 1. (1) The executive Power shall be vested in a President of the United States of America He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows
- (2) Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector
- (3) [The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or

more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President] 7

- (4) The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.
- (5) No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States
- (6) In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected
- (7) The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.
- (8) Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation —"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability preserve, protect and defend the Constitution of the United States."
- Section 2 (1) The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.
- (2) He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
 - (3) The President shall have Power to fill all Vacancies that may happen

⁷ Superseded by Amendment XII See also Amendment XX.

during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session

Section 3 He shall from time to time give to the Congress Information of the State of the Union, and recommend to their consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper, he shall receive Ambassadors and other public Ministers, he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1 The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office

- Section 2. (1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls,—to all Cases of admiralty and maritime Jurisdiction,—to Controversies to which the United States shall be a Party,—to Controversies between two or more States,—between a State and Citizens of another State,8—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects
- (2) In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Juridiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
- (3) The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed, but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3 (1) Treason against the United States shall consist only

⁸ See Amendment XI.

in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

(2) The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. (1) The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

- (2) A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.
- (3) No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.
- Section 3 (1) New States may be admitted by the Congress into this Union, but no new State shall be formed or erected within the Jurisdiction of any other State, nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.
- (2) The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States, and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4 The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion, and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by

the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article, and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

- (1) All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.
- (2) This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwith-standing.
- (3) The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our Names.

Go. WASHINGTON—Presidt.

and deputy from Virginia.

Attest WILLIAM JACKSON Secretary.

| New Hampshire | ∫John Langdon ∖Nicholas Gilman |
|-----------------|--|
| Massachusetts . | Nathaniel Gorham Rufus King |
| Connecticut | \int \text{Wm: Saml. Johnson} \text{Roger Sherman} |
| New York | Alexander Hamilton |

| New Jersey | Wil Livingston David Brearley. Wm. Paterson. Jona Dayton |
|------------------|--|
| Pennsylvania | B. Franklin Thomas Mifflin Robt Morris Geo. Clymer Thos. Fitzsimons Jared Ingersoll James Wilson Gouv Morris |
| Delaware . | Geo: Read Gunning Bedford jun John Dickinson Richard Bassett Jaco: Broom |
| Maryland | { James McHenry Dan of St Thos Jenifer Danl. Carroll |
| Virginia | ∫John Blair —— James Madıson Jr. |
| North Carolina . | Wm Blount Richd Dobbs Spaight. Hu Williamson |
| South Carolina | J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler. |
| Georgia | William Few Abr Baldwin |

[The original Constitution was ratified by the States in the following order. Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788, Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788, New York, July 26, 1788; North Carolina, November 21, 1789; Rhode Island, May 29, 1790.]

[Articles in addition to and amendment of the Constitution of the United States of America, adopted pursuant to the Fifth Article of the original Constitution.]

[ARTICLE I] 9

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

[ARTICLE V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

[ARTICLE VI]

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

⁹ The first ten Amendments were all proposed by Congress on September 25, 1789, and were ratified and declared in force on December 15, 1791.

[ARTICLE VII]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[ARTICLE VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted

[ARTICLE IX]

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[ARTICLE XI] 10

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[ARTICLE XII] 11

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves, they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate,—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President,

¹⁰ Proposed by Congress on March 5, 1794, declared ratified on January 8, 1798.

¹¹ Proposed by Congress on December 12, 1803; declared ratified on September 25, 1804.

the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President] ¹²—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President, a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

[ARTICLE XIII] 18

Section I Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 Congress shall have power to enforce this article by appropriate legislation.

[ARTICLE XIV] 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

¹² Changed by Amendment XX

¹³ Proposed by Congress on February 1, 1865, declared ratified on December 18, 1865.

¹⁴ Proposed by Congress on June 16, 1866, declared ratified on July 28, 1868.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof But Congress may by a vote of two-thirds of each House, remove such disability

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[ARTICLE XV] 15

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

[ARTICLE XVI] 16

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

[ARTICLE XVII] 17

- (1) The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
- (2) When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

²⁵ Proposed by Congress on February 27, 1869, declared ratified on March 30, 1870.

¹⁶ Proposed by Congress on July 12, 1909; declared ratified on February 25, 1913.

¹⁷ Proposed by Congress on May 16, 1912; declared ratified on May 31, 1913.

(3) This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

[ARTICLE XVIII] 18

[Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2 The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress] ¹⁹

[ARTICLE XIX] 20

- (1) The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex
- (2) Congress shall have power to enforce this article by appropriate legislation.

[ARTICLE XX] 21

Section 1. The terms of the President and Vice-President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day

Section 3 If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice-President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice-President elect shall act as President until a President shall have qualified, and the Congress may by law provide for the case wherein neither a President elect nor a Vice-President elect shall have qualified, declaring who shall then act as President, or the manner in which one

¹⁸ Proposed by Congress on December 17, 1917, declared ratified on January 29, 1919.
¹⁹ Repealed by Amendment XXI.

²⁰ Proposed by Congress on June 5, 1919, declared ratified on August 26, 1920. ²¹ Proposed by Congress on March 2, 1932, declared ratified on February 6, 1933.

who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified

Section 4 The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

[ARTICLE XXI] 22

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3 This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

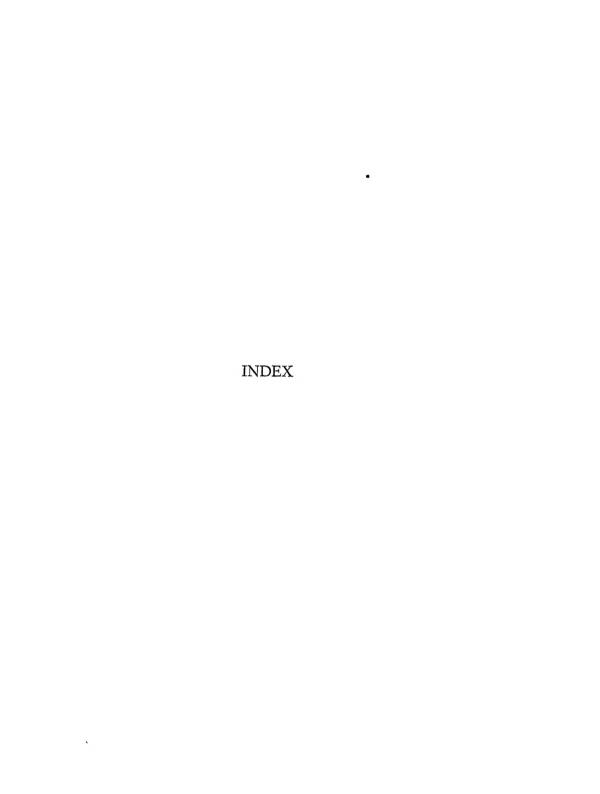
[Proposed Child Labor Amendment] 23

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

Section 2. The power of the several States is unimpaired by this Article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

²² Proposed by Congress on February 20, 1933, declared ratified on December 5, 1933 Amendment XXI was the first to require ratification by state conventions

²³ This amendment is now before the states for ratification, having been proposed by Congress on June 2, 1924.





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